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No.

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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IN THE

Supreme Court of the United States

October Term, 1986

WALTER J. KELLY, Superintendent,
Attica Correctional Facility,
and STATE OF NEW YORK,

Petitioners,

-against-

GREGORY JOHNSTONE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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50pp

QUESTIONS PRESENTED

1. Assuming that the petitioner was denied the opportunity to proceed pro se at his state trial, does a decision which obligates the state to provide petitioner a second trial with an attorney violate appropriate norms of comity and Sixth Amendment remedial action?

2. Is a state court finding that a defendant has not unequivocally sought pro se representation a finding of fact which, in a habeas corpus proceeding, must be presumed correct?

3. Has a criminal defendant who on the day of trial asks to proceed pro se only because he wrongly believes that an appellate court will reverse his conviction and provide him with new

counsel made an unequivocal knowing and voluntary waiver of his right to counsel?

4. If habeas corpus is a proceeding in equity, and the petitioner's guilt was conclusively established at a full and fair state trial, does a district judge have the discretion to consider that his representation by counsel was "harmless error" and not issue the writ?

TABLE OF AUTHORITIES

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PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and the Associate Justices of the Supreme Court:

The New York County District Attorney, on behalf of the State of New York and Walter J. Kelly, Superintendent of Attica Correctional Facility,

petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit (App. Exh. A, pp. 1-11)* is reported at 808 F.2d 214. The opinion of the Second Circuit on the post-judgment motion for clarification (App. Exh. B, pp. 12-14) is not reported. The opinion of the United States District Court for the Southern District of New York (App. Exh. C, pp. 15-43) is reported at 633 F.Supp. 1245. The order of the Appellate Division, First Department, affirming the judgment of conviction without opinion is reported at 106 A.D.2d 924,

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*The Appendix to the petition is separately bound.

484 N.Y.S.2d 1020. The order of Judge Judith S. Kaye denying leave to appeal to the New York Court of Appeals is reported at 64 N.Y.2d 1135, 490 N.Y.S.2d 1030.

JURISDICTION

The judgment of the Court of Appeals was entered on December 24, 1986 (App. Exh. D, p. 44). The motion for clarification was denied on March 2, 1987 (App. Exh. B, pp. 12-14). The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1). The time for filing a petition for certiorari has been extended to April 23, 1987, by order of the Honorable Thurgood Marshall.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment of the United States Constitution provides, in pertinent part:

> ... Nor shall any State deprive any person of life, liberty, or property, without due process of law.

The Sixth Amendment of the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right...to have the assistance of counsel for his defence.

28 U.S.C. section 2254(a) provides:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. section 2254(d) provides, in pertinent part:

> In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct....

28 U.S.C. section 2243 provides, in pertinent part:

> The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

STATEMENT OF THE CASE

During the early hours of November 16, 1980, Gregory Johnstone, who was seventeen years old and

accompanied by two younger children, broke into an apartment building in upper Manhattan. Johnstone and his accomplices set a fire using flammable liquids, and then fled the building. The resulting fire destroyed one apartment and damaged others. Several tenants and a firefighter suffered injuries from burns and smoke inhalation.

Johnstone was arrested, indicted, and brought to trial. His first trial, from October 23 to November 10, 1981, resulted in a hung jury. Johnstone was represented by state-assigned counsel at that trial.

At the outset of the second trial, on January 5, 1982, Johnstone sought to have the court replace the assigned attorney. When that applica-

tion was denied Johnstone declared that he wanted to proceed to trial without counsel because he believed that an appellate court would reverse his conviction and he would get new counsel for a retrial (App. Exh. E, pp. 52, 62-64, Tr. 6, 12-13). He also insisted that he was "not going to represent myself" or otherwise participate at the trial (App. Exh. E, pp. 48, 52, Tr. 3, 6). After questioning Johnstone, the judge refused to permit Johnstone to proceed pro se. The judge directed the assigned attorney to follow Johnstone's instructions regarding any strategy for the defense, including not participating. The court and Johnstone's attorney viewed Johnstone's request to proceed pro se as an effort to obtain substitute counsel (App. Exh. E, pp. 73-74, Tr. 20).

The next day, January 6, the judge denied Johnstone's request "to do some speaking myself" during the trial, suggesting that the defense should "try" cross-examination through assigned counsel to "see how it works out." The judge denied Johnstone permission to make an opening statement, but permitted him to sum up personally rather than through counsel.

Johnstone was convicted and sentenced to concurrent terms of from three to nine years for convictions of second degree arson and first degree burglary. He is now on parole.

THE STATE APPEAL

On direct appeal Johnstone contended, inter alia, that he was denied the right to represent himself.

The state contended that the application to proceed pro se was equivocal. The state argued that the purported waiver was a deliberate effort by Johnstone to manipulate the judicial process to obtain his true goal, a new attorney. The Appellate Division, First Department, affirmed the conviction without opinion. Permission for leave to appeal to the New York Court of Appeals was denied.

THE FEDERAL HABEAS CORPUS PROCEEDING

The District Court

By a petition filed on December 3, 1985, Johnstone sought a writ of habeas corpus from the United States District Court for the Southern District of New York. In the petition, Johnstone contended that the state

violated his constitutional rights "by denying petitioner's knowing and unequivocal request to proceed pro se." In response, the state again contended that the request was, as a tactic to obtain new counsel, equivocal and not a knowing or intelligent waiver of the right to counsel.

After a de novo review of the transcript of the state proceedings, District Judge Charles L. Brieant concluded that there had been a voluntary and unequivocal waiver of the right to counsel, even if Johnstone's intent was to "parlay his pro se defense into a mistrial and reversal and ultimately, a new lawyer" (App. Exh. C, p. 32). However, Judge Brieant further concluded that, because "guilt in this case is clear," the error in refusing to

allow Johnstone to represent himself was subject to harmless constitutional error analysis (App. Exh. C, p. 35).

In doing so, Judge Brieant noted an apparent inconsistency in Sixth Amendment error analysis between a footnote in McKaskle v. Wiggins, 465 U.S. 168, 177 n.8, 104 S.Ct. 944, 950 n.8, 79 L.Ed.2d 122, 133 n.8 (1984) (right to proceed pro se) and Delaware v. Van Arsdall _____ U.S. _____, ___, 106 S.Ct. 1431, 1433, 89 L.Ed.2d 674, 680 (1986) (right to confrontation). Concluding that a harmless error test was permissible on habeas corpus review, Judge Brieant found that denial of Johnson's right to represent himself was harmless error beyond a reasonable doubt, and denied the petition, but

issued a certificate of probable cause to appeal.

The Second Circuit

On appeal to the United States Court of Appeals for the Second Circuit, Johnstone contended that denial of the right to proceed pro se was "never" subject to harmless error analysis. The state, noting that the state judge's factual finding should have been presumed correct, contended that Johnstone's effort to manipulate the judicial process was not an unequivocal waiver of the right to counsel. In addition, the state contended that harmless error analysis should apply.

In an opinion by Judge Jon O. Newman, the Second Circuit concluded that Johnstone's waiver of counsel was valid. The court recognized that the

United States Supreme Court "has never directly confronted the question" whether harmless error analysis would be applicable to waiver of the right to counsel (App. Exh. A, p. 7). However, the court relied upon language in McKaskle v. Wiggins, 465 U.S. 168, 177 n.8, 104 S.Ct. 944, 950 n.8, 78 L.Ed.2d 122, 133 n.8 (1984), and Flanagan v. United States, 465 U.S. 259, 267-268, 104 S.Ct. 1051, 1056, 78 L.Ed.2d 288, 296 (1984), to conclude that harmless error analysis would "never" be available. For that reason, the Second Circuit directed Judge Brieant "to order the petitioner's release unless the State promptly affords him a new trial" (App. Exh. A, p. 11).

Thereafter, the state moved for clarification of the Second

Circuit's judgment. Noting that Johnstone's claim was only that he had lost the right to proceed pro se, the state argued that the only reasonable relief to afford him was a retrial at which he would proceed pro se. The state pointed to United States v. Morrison, 449 U.S. 361, 364, 101 S.Ct. 665, 667, 66 L.Ed.2d 564, 568 (1981), which declared that, with respect to Sixth Amendment deprivations, "remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests."

In an opinion, the Second Circuit ignored Morrison and concluded that, although Johnstone had received one trial with the full assistance of counsel, the state was obligated to

afford Johnstone a new trial with counsel (App. Exh. B).

REASONS FOR GRANTING THE WRIT

1. The decision in this case transforms federal habeas corpus review of state convictions into no less than the power to exercise broad supervisory authority over the state courts. Johnstone was tried with the assistance of counsel. He premised his habeas corpus petition on the ground that he was wrongly refused the right to dismiss the attorney and proceed pro se. Logic, law, and justice dictate that if Johnstone is correct, then the appropriate remedy is to afford him only the opportunity to proceed pro se. The Second Circuit has declared, however,

that the state is obligated to afford Johnstone a second counselled trial if he so chooses. This exercise of excessive remedial authority raises an important question that this Court should accept for review.

Primarily, we believe that the remedy imposed by the Second Circuit was plainly beyond that required. With respect to Sixth Amendment analysis the federal court unfairly is forcing the state to provide a prophylactic remedy that goes beyond the "injury suffered." United States v. Morrison, 449 U.S. 361, 364, 101 S.Ct. 665, 667, 66 L.Ed.2d 564, 568 (1981); see also Rushen v. Spain, 464 U.S. 114, 104 S.Ct. 453, 78 L.Ed.2d 267 (1983). In Morrison, this Court squarely addressed what the Constitution

requires when the Sixth Amendment Right to Counsel is violated. There, federal agents approached and obtained statements from an indicted defendant in the absence of counsel. The Third Circuit concluded that dismissal of the indictment was the required remedy.

This Court reversed, declaring that "Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." 449 U.S. at 364, 101 S.Ct. at 667, 66 L.Ed.2d at 568. Here, because the loss to Johnstone was no more than a pro se trial, that is the sum and substance

that the Sixth Amendment ordains be provided him to make him whole.*

Further, and importantly, the Second Circuit has undertaken this expansion of Sixth Amendment remedial analysis in the context of a collateral habeas corpus proceeding. It is our position that proper respect for the states' processes means that the remedies fashioned by federal courts are limited by what "law and justice require," 28 U.S.C. § 2243, and neither law nor justice requires a remedy that

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*We should note that the only express discussion on remedy in a pro se representation case that we have found was in a dissent in a New York state case. People v. Smith, 68 N.Y.2d 737, 739, 743-744, 506 N.Y.S.2d 322, 323, 326, 497 N.E.2d 689, 690, 693 (1986), cert denied, ___ U.S. ___, 107 S.Ct. 444, 93 L.Ed.2d 392 (1986). The issue of remedy, however, was not one of the questions presented in the petition for certiorari made to this Court.

goes beyond that which was lost to a criminal defendant. Cf. Dowd v. United States ex rel. Cook, 340 U.S. 206, 71 S.Ct. 262, 95 L.Ed. 215 (1951) (where state defendant denied state appeal, appropriate remedy not new trial or release, but appellate review or release). Although concededly this rule has never been so explicitly stated by this Court, we believe that it is the proper rule to be drawn from this Court's review of habeas corpus cases. See Boles v. Stevenson, 379 U.S. 43, 45-46, 85 S.Ct. 174, 176, 13 L.Ed.2d 109, 111 (1964) (retrial or release too strict a remedy); See also Francis v. Henderson, 425 U.S. 536, 541-542, 96 S.Ct. 1708, 1711, 48 L.Ed.2d 149, 154 (1976) (federal rights should be vindicated in a manner which does not

unduly interfere with the states).

However, even if we are incorrect in our view, this case provides the Court with the opportunity to clarify the limits of the remedial action that a federal court may impose on the state in a habeas corpus proceeding. 28 U.S.C. section 2243 requires that a petition be disposed of as "law and justice require." Although more than fifty cases in this Court have referred to the phrase "law and justice require," the efforts to interpret it have been tentative and inconsistent.*

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*See, e.g., Kuhlmann v. Wilson, ___ U.S. ____, ___ n.11, 106 S.Ct. 2616, 2625 n.11, 91 L.Ed.2d 364, 378 n.11 (1986) (plurality)(implicates sensitivity to competing interests); Smith v. Murray, ___ U.S. ___, ___, ___, 106 S.Ct. 2661, 2669-2675, 91 L.Ed.2d 434, 448-455 (1986) (Stevens, J., dissenting) (in procedural default

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This Court's own varied view justifies review in this case.

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context requires consideration of type of claim); Murray v. Carrier, ____ U.S. ___, ___, ___, 106 S.Ct. 2639, 2650, 2652-2653, 91 L.Ed.2d 397, 414, 415-417 (1986) (Stevens, J., concurring) (same); Stone v. Powell, 428 U.S. 465, 473 n.11, 96 S.Ct. 3037, 3044 n.11, 49 L.Ed.2d 1067, 1078 n.11 (1976)(represents a broad power, but equitable considerations may limit its exercise); Peyton v. Rowe, 391 U.S. 54, 66-67, 88 S.Ct. 1549, 1556, 20 L.Ed.2d 426, 434 (1968) (permits "appropriate relief" other than immediate release); Fay v. Noia, 372 U.S. 391, 430-431, 83 S.Ct.822, 844, 9 L.Ed.2d 837, 864 (1963) (permits federal court only to order release); Salinger v. Loisel, 265 U.S. 224, 231, 44 S.Ct. 519, 521, 68 L.Ed. 989, 996 (1924) (lays down no specific rule); Storti v. Massachusetts, 183 U.S. 138, 143, 22 S.Ct. 72, 74, 46 L.Ed. 120, 124 (1901) (calls for "substantial justice" to result); In Re Bonner, 151 U.S. 242, 261, 14 S.Ct. 323, 327, 38 L.Ed. 149, 153(1894) (invests court with "largest" power to control form of judgment).

2. In Faretta v. California, 422 U.S. 806, 835, 95 S.Ct. 2525, 2541, 45 L.Ed.2d 562, 581, this Court pointed to Johnson v. Zerbst, 304 U.S. 458, 464-465, 58 S.Ct. 1019, 1023, 82 L.Ed.2d 1461 (1938), as providing the test for whether the right to counsel is truly being waived. That test, in turn, presumes against waiver of counsel and obligates the state to meet a heavy burden to show that there has been a waiver of counsel. Of course, although each case depends highly on its factual circumstances, neither Faretta, a non-habeas corpus case, nor McKaskle v. Wiggins, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984), the only other case in this Court to focus on pro se representation, addressed two questions of critical concern to habeas corpus

proceedings. Both questions of which are presented herein.

The first question is whether the existence of a valid waiver of representation is essentially a question of fact. If it is, as we believe, then we are faced with a federal court that declined to place credence on the state factual finding that Johnstone's request was not a bona fide desire to proceed without counsel. Despite being reminded by the state of its obligation to presume that the facts found by the state court were correct, the Second Circuit did no more analysis than agree with the district judge's de novo review of the cold record. The court thus failed to accord presumptive weight to the state judge's conclusion that Johnstone's request was not a true

waiver of counsel, but was an effort to gain new counsel. That result is inconsistent with the commands of 28 U.S.C. section 2554(d) and of this Court, e.g., Miller v. Fenton, 472 U.S. 1025, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985).

Simply put, whether a defendant is unequivocally seeking to represent himself is essentially a question of fact. Like questions of a defendant's competency, Maggio v. Fulford, 462 U.S. 111, 103 S.Ct. 2261, 76 L.Ed.2d 794 (1983) or understanding, Marshall v. Lonberger, 459 U.S. 422, 431-437, 103 S.Ct. 843, 849-852, 74 L.Ed.2d 646, 656-661 (1983), or the mental state of a juror, Patton v. Yount, 467 U.S. 1025, 104 S.Ct 2885, 81 L.Ed.2d 847 (1984), the state of

Johnstone's mind was uniquely a factual question best considered by the state judge who interviewed him. His conclusion, assented to by the assigned attorney, was entitled to presumptive weight.* We recognize, of course, that the validity of waivers of counsel that take place outside a courtroom are mixed questions of law and fact. Brewer v. Williams, 430 U.S. 387, 403-404, 97 S.Ct. 1232, 1242, 51 L.Ed.2d 424, 439 (1977), and that at least one circuit apparently has applied that rule to the

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*Even more frustrating to us is that although the Second Circuit ignored its obligation to presume the state court correct in this habeas corpus proceeding, it has held this precise issue to be a "question of fact" in its direct review of federal prosecutions. United States v. Tompkins 623 F2d 82, 829 (2d Cir. 1980), on remand, 541 F.Supp. 799 (W.D.N.Y. 1982), aff'd, 729 F.2d 1440 (2d Cir. 1983).

waiver of counsel in pro se request cases, Fitzpatrick v. Wainwright, 800 F.2d 1057, 1063 (11th Cir. 1986). However, we ask this Court to clarify whether an in-court determination of a waiver of counsel by a judge who has questioned the defendant is not a question of fact different from the type of question presented when a court determines whether counsel was waived during events that occur outside a courtroom.

3. Further, even if it were plain that whether a pro se request is unequivocal is a legal rather than a factual question, this case merits review. As Justice Blackmun noted in his dissent in Faretta, the question of how waiver is to be "measured" was left

open in that case. 422 U.S. at 852, 95 S.Ct. at 2549, 45 L.Ed.2d at 592. The need for clarification is evidenced by the disagreement between the state and the federal courts in their approach to this case.

Essentially, the federal courts in this case concluded that the mere mouthing of the words, "I want to proceed pro se," regardless of the context of those words or the reason they were uttered, constitutes an unequivocal request. However, Faretta mandates more in its requirement that the waiver of counsel be knowing and voluntary.

In fact, the district judge's and Second Circuit's reliance on the mere mouthing of Johnstone's request and the state judge's warnings stands in

stark contrast to the recent conclusion of the 11th Circuit that it is not the "court's express advice, but rather the defendant's understanding" that controls. Fitzpatrick v. Wainwright, 800 F.2d 1057, supra. It stands in contrast as well to this Court's command in Faretta that a waiver cannot be accepted unless the judge is assured that the defendant makes it with his "eyes open." 422 U.S. at 835, 95 S.Ct. at 2541, 45 L.Ed.2d at 582.*

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*Indeed, the facts here are similar to other cases where the request to proceed pro se is made only because of dissatisfaction with assigned counsel. Unlike the Second Circuit, other courts have been adverse to finding a waiver of counsel in this situation. United States v. Welty, 674 F.2d 185 (3d Cir. 1982); Peede v. State, 474 So.2d 808 (Fla. 1985) cert. denied, ___ U.S.___, 106 S.Ct.___, 91 L.Ed.2d 575 (1986); Hinton v. State, 473 So.2d

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It is true that, standing alone, the fate of Johnstone would not justify further review. However, the facts of this case provide this Court with an opportunity to clarify the conflict in approach by the courts to the question of how waiver is to

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1116 (Ala. Cr. App. 1984); see State v. Brittain, 38 Wash.App.2d 740 689 P.2d 1095 (1984). While the Faretta opinion does refer to the fact that Faretta made an alternate request for different counsel, 422 U.S. at 810 n.5, 95 S.Ct. at 2529 n.5, 45 L.Ed.2d at 568 n.5, there is nothing in the opinion that undercuts the notion that Faretta's primary goal, unlike Johnstone's, was to represent himself. In fact, Faretta requested counsel other than the public defender only after he was denied the opportunity to proceed pro se. Brief for Petitioner at 9-10, Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

be measured. As noted, the federal courts in this case relied on the request itself. The state judge relied on whether Johnstone understood the pitfalls of that request, an approach taken by at least some other courts. Here, Johnstone repeatedly emphasized that, if forced to proceed pro se, he would do nothing in his defense. He believed, erroneously, that to proceed pro se would result in the reversal of his conviction by an appellate court and a new trial with new assigned counsel.

The approach of the state court was that a request to proceed pro se based on such a misunderstanding could scarcely be viewed as unequivocal. Simply put, because Johnstone stubbornly refused to accept the state judge's effort to explain Johnstone's mistake of

law, the request can scarcely be viewed as intelligent.*

4. Finally, the harmless error question which divided the federal courts below raises a substantial question for this Court to resolve. Without doubt, this Court has advanced in dicta both the notion that denial of a bona fide request to proceed pro se "is not amenable to 'harmless error' analysis," McKaskle v. Wiggins, 465 U.S. at 177 n.8, 104 S.Ct. at 950 n.8, 79

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*Ironically, Johnstone has been able to manipulate the review process in such a way that the Second Circuit gives him precisely the impermissible advantage he sought by using a request to proceed pro se as a tool to obtain different counsel. His desire to proceed pro se was motivated solely by the belief that, if he did so, he would obtain a reversal of his conviction and new counsel on the retrial.

L.Ed.2d at 133 n.8, supra,* and the notion that prejudice need not be shown, Flanagan v. United States, 465 U.S. 2259, 2267-2268, 104 S.Ct. 1051, 1056, 78 L.Ed.2d 288, 296 (1984). Some circuits appear to have accepted that dicta. Dorman v. Wainwright, 798 F.2d 1358, 1370 (11th Cir. 1986), cert. denied sub nom. Dugger v. Dorman, 55 U.S.L.W. 3661 (U.S. Mar. 30, 1987);

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*Despite the dicta in McKaskle, it is difficult to see how the result in that case is not anything but an acceptance of the possibility of harmless error. There, the Court analyzed whether certain failures in affording McKaskle complete pro se representation required reversal of his conviction, and concluded that it did not. Since, Johnstone, for example, gave his own summation, he received at least some pro se representation. That being so, that is another reason why the Second Circuit should not have engaged in a "bright line" rejection of harmless error analysis.

United States v. Rankin, 779 F.2d 956, 960-961 (3d Cir. 1986); see also Wilson v. Mintzes, 761 F.2d 275, 286 (6th Cir. 1985), or have otherwise rejected harmless error analysis, Bittaker v. Enomoto, 587 F.2d 400, 403 (9th Cir. 1978), cert. denied, 441 U.S. 913, 99 S.Ct. 2013, 60 L.Ed.2d 386 (1979); Chapman v. United States, 553 F.2d 886, 891-892 (5th Cir. 1977).

On the other hand, two circuits have concluded that a harmless error analysis may be applied to the wrongful acceptance of a waiver of counsel and grant of a request to proceed pro se. Richardson v. Lucas, 741 F.2d 753, 757 (5th Cir. 1984); United States v. Gipson, 693 F.2d 109, 112 (10th Cir. 1982), cert. denied, 459 U.S. 1216, 103 S.Ct. 1218, 75 L.Ed.2d

455 (1983). It is difficult to see why the analysis should differ, or how harmless error can exist on the one hand, but not the other.

At times, this Court also has advanced the proposition that the Constitution permits harmless error analysis concerning all but the most fundamental of errors. Delaware v. Van Arsdall, ___ U.S. ___, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986); Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Indeed, in Rushen v. Spain, 464 U.S. at 117 n.2, 104 S.Ct. at 455 n.2, 78 L.Ed.2d at 272-273 n.2, supra, for example, the Court found harmless error analysis appropriate to the right to be present and to be represented by counsel. It scarcely seems fair to set a standard

that presumes against waiver of counsel, and, indeed, requires the state to meet a heavy burden to show waiver of counsel, and then deny the possibility of harmless error. Certainly, if that is to be the case, such a question should not be determined by the dicta of McKaskle and Flanagan.

The facts of this case, itself, call into question this Court's previous dicta, and call for the Court to finally determine, on a record which lucidly presents the issue, the question of harmless error which Justice Blackmun, in his dissent in Faretta, recognized had been left unanswered by that case. 422 U.S. at 852, 95 S.Ct. at 2549, 45 L.Ed.2d at 591-592.

Indeed, to enforce a "bright line" refusal to employ "harmless error"

analysis in such situations as ours is to lose sight of the realities of the events underlying a given case. Here, the alleged error is found in the context of a collateral habeas corpus proceeding. Such a proceeding is, of course, equitable in nature and should not simply be treated as another level of appellate review. Stone v. Powell, 428 U.S. 465, 478 n.11, 96 S.Ct. 3037, 3044 n.11, 49 L.Ed.2d 1067, 1078 n.11 (1976). Further, recent opinions from this Court suggest that a growing concern in habeas corpus proceedings is whether the criminal proceedings resulted in an untrustworthy verdict.

Thus, it has been suggested, in various contexts, that habeas corpus review should consider if the verdict is reliable, Murray v. Carrier, __U.S.__,

___-___, 106 S.Ct. 2639, 2649-2650, 91 L.Ed.2d 397, 413 (1986)(procedural forfeiture); or if the petitioner has suffered "fundamental unfairness," Rose v. Lundy, 455 U.S. 509, 538, 547, 102 S.Ct. 1198, 1213, 1218, 71 L.Ed.2d 379, 400, 406 (1982) (Stevens, J., dissenting); or if the petitioner has made a "colorable" showing of factual innocence," Kuhlmann v. Wilson, ___ U.S. __, __, 106 S.Ct. 2616, 2627, 91 L.Ed.2d 364, 381 (1986) (plurality) (successive petitions). See also Storti v. Massachusetts, 183 U.S. 138, 143, 22 S.Ct. 72, 74, 46 L.Ed. 120, 124 (1901) (to achieve substantial justice is purpose of review). If, as the district judge concluded, the state's alleged mistake was harmless and the verdict was trustworthy, at a minimum the district

judge possessed the discretion not to issue the writ. That being so, the Second Circuit should not have employed a standard of review that refused to recognize that discretion, as well as the equities of this case and the possibility of harmless error.

* * * * *

Plainly, we recognize that the fate of the prosecution against Gregory Johnstone does not justify, in itself, the grant of certiorari. By seeking certiorari, we do not simply seek correction of the single wrong committed, we believe, by the Second Circuit. What we seek is vindication of the view that federal remedial action over state judicial processes should be limited to that which is necessary to right the perceived wrong. Any other

view topples the established norms of federal-state comity.

In addition, we seek clarification of the Faretta decision in the context of habeas corpus review. We ask the court to determine whether the waiver of counsel in that context is a factual or legal question and how it should be measured, and whether the equitable nature of habeas corpus permits the consideration of harmless error. The Second Circuit has ratified Johnstone's abuse of the state judiciary system. We seek relief from the only place the state can now turn.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

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WALTER J. KELLY, Superintendent,
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Petitioners,

-against-

GREGORY JOHNSTONE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

APPENDIX IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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APPENDIX

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EXHIBIT A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 160—August Term, 1986

(Argued: September 22, 1986

Decided: December 24, 1986)

Docket No. 86-2199

GREGORY JOHNSTONE,

Petitioner-Appellant,

— v. —

WALTER J. KELLY, Superintendent, Attica Correctional Facility,

Respondent-Appellee.

Before:

VAN GRAAFEILAND, MESKILL, and NEWMAN,

Circuit Judges.

Appeal from a judgment of the District Court for the Southern District of New York (Charles L. Brieant, Jr.,

Chief Judge) denying a petition for a writ of habeas corpus challenging petitioner's state court conviction.

Reversed and remanded.

James C. La Forge, New York, N.Y. (Philip L. Weinstein, New York, N.Y., on the brief), for petitioner-appellant.

Esther Furman, Asst. Atty. Gen., New York, N.Y. (Robert Abrams, Atty. Gen., Maryellen Weinberg, Robert J. Schack, Asst. Attys. Gen., New York, N.Y., on the brief), for respondent-appellee.

JON O. NEWMAN, *Circuit Judge*:

This appeal presents the issue whether denial of a defendant's constitutional right to represent himself at a criminal trial can be harmless error. The issue arises on an appeal by Gregory Johnstone from a judgment of the District Court for the Southern District of New York (Charles L. Brieant, Jr., Chief Judge) denying his petition for a writ of habeas corpus to challenge his state court conviction. Although concluding that the state trial court infringed Johnstone's Sixth Amendment right to self-representation, the District Court dismissed Johnstone's petition upon a finding that the constitutional violation was harmless error. 633 F. Supp. 1245, 1250-51 (1986). Because the District Court erred in applying a harmless error test to a violation of the right to self-representation, we reverse the District Court's decision and remand with

instructions to order petitioner's release unless the State promptly affords him a new trial.

Background

In 1981, the State of New York indicted Johnstone on arson and burglary charges in connection with the destruction of an apartment building in New York City. His first trial in the Supreme Court of New York ended in a mistrial when the jury failed to agree on a verdict. At that time Johnstone was represented by Ira Van Leer, a court-appointed attorney.

On January 4, 1982, two days before the scheduled start of his second trial, Johnstone appeared before Judge Burton G. Roberts to request that Atty. Van Leer be relieved as his counsel and that new counsel be appointed. Judge Roberts denied Johnstone's requests. On January 5, 1982, Johnstone appeared before Judge Arnold G. Fraiman, the judge presiding over his second trial, to renew his request for different appointed counsel. At that time, Johnstone expressed his displeasure with Atty. Van Leer's handling of the case; in particular, he objected to Atty. Van Leer's filing of a notice of an insanity defense in the first trial without consulting Johnstone. Judge Fraiman found these grounds inadequate to justify appointment of new counsel. Upon learning that he could not obtain new counsel, Johnstone stated that he preferred to conduct his own defense rather than be represented by Atty. Van Leer. Judge Fraiman inquired into Johnstone's age, education, employment, and familiarity with legal proceedings. Judge Fraiman then contrasted Johnstone's abilities with those of Atty. Van Leer, pointing out that Van Leer had avoided a conviction in the first trial. Emphasizing Johnstone's comparative youth, lack of legal training, and minimal experience with legal proceedings, Judge Fraiman

repeatedly warned Johnstone of the grave risks of defending himself against serious charges.

Despite Judge Fraiman's stern warnings, Johnstone persisted in his request to proceed *pro se*. Johnstone stated that he had studied the indictment and had carefully read the papers in his case each night. Upon the court's direction to Van Leer to continue his representation of Johnstone, Van Leer amplified Johnstone's remarks, noting that "[Johnstone] is intelligent, he reads all the minutes. He has all the minutes. He can proceed." Judge Fraiman acknowledged that Johnstone was competent to stand trial; nonetheless, he concluded that Johnstone was "not qualified" to represent himself because he lacked "the requisite education, background or training or experience." Judge Fraiman found that "[Johnstone] is eighteen, he has scarcely any formal education so far as I can ascertain, he has no known occupation and he has virtually no previous exposure to legal procedures, except for the first trial."

At the commencement of trial on January 6, 1982, Johnstone asked to make the opening statement and to begin cross-examination of the witnesses. Judge Fraiman ruled that petitioner could not conduct the defense himself and directed Van Leer to make Johnstone's opening statement. Van Leer conducted Johnstone's defense during the presentation of evidence. At the close of evidence, Johnstone asked to make the closing argument. After vehemently discouraging Johnstone from attempting his own summation, Judge Fraiman allowed Johnstone to present his summation himself. The jury subsequently convicted Johnstone.

Upon exhaustion of state court remedies, Johnstone filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (1982) with the District Court. Chief Judge

Brieant found that Johnstone had knowingly and voluntarily waived his right to counsel. Although concluding that the trial judge violated Johnstone's Sixth Amendment right to proceed *pro se*, the District Judge held that such error was harmless and therefore refused to grant the writ. 633 F. Supp. at 1250-51.

Discussion

We agree with Chief Judge Brieant that the state trial court violated Johnstone's Sixth Amendment right to proceed *pro se*. In *Faretta v. California*, 422 U.S. 806 (1975), the Supreme Court declared that this right may be exercised by all criminal defendants who knowingly, voluntarily, and unequivocally waive their right to appointed counsel. *Id.* at 835-36. The record in the present case indicates that Johnstone was competent to stand trial and that he clearly sought to represent himself after being duly warned of the risks of doing so. Nevertheless, Judge Fraiman denied this request on the ground that Johnstone lacked the "requisite education, background or training or experience." *Faretta* imposes no such qualifications on the right to defend *pro se*.

The State of New York contends that Johnstone sought to represent himself merely as a threat designed to obtain different appointed counsel.[1] Though the record indicates

[1]The State attempts to bolster its "no waiver" argument by suggesting that criminal defendants generally will use the threat of self-representation as a means for obtaining different appointed counsel. We find this argument wanting because the risk of having to defend serious criminal charges without any lawyer should a request to proceed *pro se* be granted seems to outweigh any advantage from obtaining different counsel. *Cf. Faretta v. California, supra*, 422 U.S. at 834-35 n.46 (noting that a defendant who exercises his right to appear *pro se* "cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel' ").

that Johnstone preferred to have new counsel appointed, it also indicates that Johnstone steadfastly sought to represent himself despite numerous warnings from Judge Fraiman of the risks of forgoing counsel.[2] We agree with Chief Judge Brieant's conclusion that Johnstone's persistent requests to represent himself satisfied *Faretta*'s requirement of a knowing, voluntary, and unequivocal waiver of the right to appointed counsel.

We are not unmindful of trial judges' concern with ensuring that criminal defendants receive adequate legal representation. Although the Constitution prohibits courts from requiring criminal defendants to be defended by counsel, *see Faretta v. California, supra*, 422 U.S. at 833, it does not foreclose trial courts from using less overbearing means of ensuring that *pro se* defendants have adequate legal representation. In cases in which the trial judge fears that a *pro se* defendant lacks the ability to defend himself adequately, the judge can appoint counsel to assist the defendant in his *pro se* defense. *See Faretta v. California, supra*, 422 U.S. at 834-35 n.46; *McKaskle v. Wiggins*, 465 U.S. 168, 183-85 (1984). Such "standby counsel" should not, however, assume the primary role in defending unless the defendant so requests. *See id.* at 181-83.

The principal issue on this appeal is whether the state trial court's violation of Johnstone's Sixth Amendment right to proceed *pro se* requires reversal automatically or may be disregarded if properly determined to be harmless error. Chief Judge Brieant determined that the denial of

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[2]A request to proceed *pro se* is not equivocal merely because it is an alternative position, advanced as a fall-back to a primary request for different counsel. *See Faretta v. California, supra*, 422 U.S. at 810 n.5, 835-36; *United States v. Denno*, 348 F.2d 12, 14 n.1, 16 (2d Cir. 1965), *cert. denied*, 384 U.S. 1007 (1966).

the right to proceed *pro se*, like certain other procedural rights, is subject to harmless error analysis. *See Chapman v. California*, 386 U.S. 18 (1967); *Delaware v. Van Arsdall*, 106 S. Ct. 1431, 1436 (1986). Applying this standard, the District Court denied Johnstone's petition for a writ of habeas corpus. 633 F. Supp. at 1250-51.

Although the Supreme Court has never directly confronted the question raised by this appeal, it has strongly suggested in two recent cases that denial of the Sixth Amendment right to self-representation can never be harmless error. In *McKaskle v. Wiggins*, 465 U.S. 168 (1984), the Supreme Court addressed the proper role of standby counsel where a criminal defendant has elected to proceed *pro se*. In concluding that the right to self-representation must impose some limitations on the level of participation by standby counsel, the Court commented:

> Since the right to self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to "harmless error" analysis. The right is either respected or denied; its deprivation cannot be harmless.

McKaskle v. Wiggins, supra, 465 U.S. at 177 n.8.

The Supreme Court endorsed this reasoning in *Flanagan v. United States*, 465 U.S. 259 (1984). In *Flanagan*, the petitioners claimed that the disqualification of counsel of their choice had deprived them of the Sixth Amendment right to assistance of counsel. In finding that such a denial was not a collateral order reviewable prior to final judgment, the Supreme Court noted:

> Petitioners correctly concede that postconviction review of a disqualification order is fully effective to

> the extent that the asserted right to counsel of one's choice is like, for example, the Sixth Amendment right to represent oneself. See *Faretta v. California*, 422 U.S. 806 (1975). Obtaining reversal for violation of such a right does not require a showing of prejudice to the defense, since the right reflects constitutional protection of the defendant's free choice independent of concern for the objective fairness of the proceeding. See *McKaskle v. Wiggins, ante*, at 177-178, n.8.... No showing of prejudice need be made to obtain reversal in these circumstances because prejudice to the defense is presumed.

Flanagan v. United States, supra, 465 U.S. at 267-68.

The Supreme Court's statements in *McKaskle* and *Flanagan* reflect its approach to the harmless error doctrine in the context of constitutional claims. The Court developed the doctrine of harmless error in order to preserve convictions resulting from fair trials in cases in which some immaterial error occurred. *See Chapman v. California, supra*, 386 U.S. at 23-24; *Delaware v. Van Arsdall, supra*, 106 S. Ct. at 1436-37. Since a conviction will be upheld only if the result would almost certainly have been the same had the error not occurred, the doctrine promotes judicial economy without sacrificing fairness. However, despite the strong public interest in judicial economy, the Supreme Court has recognized that some constitutional errors require reversal without regard to whether such errors might have affected the outcome of the trial. *See Chapman v. California, supra*, 386 U.S. at 23 n.8, and accompanying text; *Delaware v. Van Arsdall, supra*, 106 S. Ct. at 1437.

Since harmless error analysis serves to promote fair outcomes at trial, its application has generally been lim-

ited to denial of rights accorded defendants to facilitate their defense or to insulate them from suspect evidence. *See Chapman v. United States,* 553 F.2d 886, 891-92 (5th Cir. 1977). Harmless error analysis has not been applied to rights that are essential to the fundamental fairness of a trial or that promote systemic integrity and individual dignity. Thus, a state cannot rely upon a coerced confession, *Payne v. Arkansas,* 356 U.S. 560 (1958), it must provide a trial before an impartial tribunal, *Tumey v. Ohio,* 273 U.S. 510 (1927); *Vasquez v. Hillery,* 106 S. Ct. 617, 622-24 (1986), it must provide an indigent accused with counsel upon request, *Gideon v. Wainwright,* 372 U.S. 335 (1963), and it cannot win conviction in a jury trial upon a directed verdict. *See Rose v. Clark,* 106 S. Ct. 3101, 3106 (1986) (citing *United States v. Martin Linen Supply Co.,* 430 U.S. 564, 572-73 (1977)). These rights relate to either fundamental fairness or systemic integrity and individual dignity.

The right to self-representation derives principally from interests beyond ensuring that trial outcomes are fair. *See Chapman v. United States, supra,* 553 F.2d at 891-92. The Sixth Amendment's right to self-representation reflects values of individual integrity, autonomy, and self-expression. *See Faretta v. California, supra,* 422 U.S. at 834; *Flanagan v. United States, supra,* 465 U.S. at 268. Violation of the right to self-representation sacrifices these values even in the absence of effect on the outcome of the trial. *See id.*

Application of harmless error analysis is particularly inappropriate to denial of the right to self-representation because a harmless error standard would, in practical effect, preclude vindication of the right. Since seasoned appointed counsel can almost invariably provide better

legal representation than a *pro se* defendant, denial of a request to proceed *pro se* could rarely, if ever, be shown to have been prejudicial. The Supreme Court emphasized this concern in *McKaskle v. Wiggins, supra,* 465 U.S. at 177 n.8.

For all of these reasons, we agree with the five circuits that have concluded that violation of a defendant's right to proceed *pro se* requires automatic reversal of a criminal conviction.[3] *See Dorman v. Wainwright,* 798 F.2d 1358, 1370 (11th Cir. 1986); *United States v. Rankin,* 779 F.2d 956, 960-61 (3d Cir. 1986); *Wilson v. Mintzes,* 761 F.2d 275, 286 (6th Cir. 1985); *Bittaker v. Enomoto,* 587 F.2d 400, 403 (9th Cir. 1978), *cert. denied,* 441 U.S. 913 (1979); *Chapman v. United States,* 553 F.2d 886, 891-92 (5th Cir. 1977).

In applying a harmless error test to denial of the right to self-representation in *Johnstone,* Chief Judge Brieant was influenced most strongly by the Supreme Court's recent decision in *Delaware v. Van Arsdall,* 106 S. Ct. 1431 (1986). In *Van Arsdall,* the Court required application of harmless error analysis to a denial of a defendant's confrontation rights under the Sixth Amendment by improper restriction of cross-examination designed to show that a prosecution witness was biased. The confrontation right was not deemed so vital to the fundamental

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[3]This conclusion does not disturb our holdings in *Hodge v. Police Officers: Colon, #623; and Repuerto, #145,* 802 F.2d 58, 62 (2d Cir. 1986), and *Jenkins v. Chemical Bank,* 721 F.2d 876, 880 (2d Cir. 1983), applying a harmless error analysis to denial of appointed counsel in cases in which a statute permits the district court to appoint counsel. *See* 28 U.S.C. § 1915(d) (1982); 42 U.S.C. § 2000e-5(f) (1982). Since the authority for appointed counsel in these civil cases is statutory and is within the broad discretion of the trial court, denial of a request for appointed counsel does not invoke the same level of concern for systemic integrity and individual dignity as is presented here

fairness of every trial as to require automatic reversal for any impairment of the right. *See Delaware v. Van Arsdall, supra,* 106 S. Ct. at 1437-38. Moreover, application of a harmless error standard to the confrontation right does not invariably preclude its vindication; denial of the right of confrontation can prejudice the outcome of a trial. *See Delaware v. Van Arsdall, supra,* 106 S. Ct. at 1437-38 (discussing *Davis v. Alaska,* 415 U.S. 308 (1974)). Nothing in the *Van Arsdall* opinion contradicts the statements in *McKaskle* and *Flanagan* regarding the inapplicability of harmless error analysis to violations of the right to self-representation nor suggests that the harmless error doctrine should be expanded beyond its traditional domain. In fact, *Van Arsdall* reaffirms that

> some constitutional errors—such as denying a defendant the assistance of counsel at trial, or compelling him to stand trial before a trier of fact with a financial stake in the outcome—are so fundamental and pervasive that they require reversal without regard to the facts or circumstances of the particular case.

Delaware v. Van Arsdall, supra, 106 S. Ct. at 1437 (citations omitted).

Conclusion

For the foregoing reasons, we reverse the District Court's denial of the writ of habeas corpus and remand to the District Court with instructions to order the petitioner's release unless the State promptly affords him a new trial.

Reversed and remanded.

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EXHIBIT B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 160—August Term, 1986

Motion for clarification of
mandate submitted: February 5, 1987
Decided: March 2, 1987)

Docket No. 86-2199

GREGORY JOHNSTONE,
Petitioner-Appellant,

— v. —

WALTER J. KELLY, Superintendent, Attica Correctional Facility,
Respondent-Appellee.

Before:

VAN GRAAFEILAND, MESKILL, and NEWMAN,
Circuit Judges.

PER CURIAM:

On December 24, 1986, we ruled that the petitioner-appellant, Gregory Johnstone, was entitled to his release from custody unless the State of New York promptly afforded him a new trial. *Johnstone v. Kelly*, 808 F.2d 214 (2d Cir. 1986). That ruling resulted from a holding that Johnstone's state court conviction had been obtained in violation of his constitutional right to represent himself. The State now seeks a clarification of the mandate endorsing its view that the State can satisfy its obligation to Johnstone by affording him a retrial at which he would be required to represent himself. The State, now represented by the District Attorney for New York County,[1] contends that since the only constitutional defect in Johnstone's conviction was denial of the right to proceed *pro se*, the State need only provide a retrial at which Johnstone represents himself. If Johnstone is permitted to be represented by counsel at the retrial, the argument continues, he will "receive again what the state once provided him." Memorandum of Appellee on Motion to Clarify Mandate at 3.

The State's position is not well taken. The Sixth Amendment guarantees Johnstone the right to represent himself, if he so chooses, at any trial the State may initiate. But the Amendment also assures him the right to have the assistance of counsel. At Johnstone's first trial, he assessed the circumstances then confronting him and elected to represent himself. The unjustified denial of that request led to a conviction that was successfully challenged by a petition for a writ of habeas corpus. If the State elects to retry Johnstone rather than release him, the

[1]The motion of the District Attorney to be substituted for the Attorney General of New York is granted.

State will be obligated at any retrial to afford Johnstone all of his constitutional rights, including the right to have the assistance of counsel and the right to represent himself. In deciding which component of his Sixth Amendment right he wishes to exercise at a retrial, Johnstone is entitled to assess the circumstances then confronting him and decide whether representation by counsel or proceeding *pro se* will best serve his interests at the retrial.

If Johnstone elects to be represented by counsel at a retrial, it is not quite true, as the State contends, that he will again receive what the State once provided him. Though the State previously provided him with counsel, it denied him the choice whether to have counsel or proceed *pro se*. It is that choice that must be accorded at a retrial, if the State exercises its option to retry the petitioner.

The motion to recall and clarify the mandate is denied.

EXHIBIT C

GREGORY JOHNSTONE,

Petitioner,

v.

WALTER J. KELLY, Superintendent,
Attica Correctional Facility,

Respondent.

No. 85 Civ. 9444 - (CLB)
United States District Court
S.D. New York
April 29, 1986

(reported at 633 F. Supp. 1245)

MEMORANDUM AND ORDER

BRIEANT, District Judge.

By his petition and supporting memorandum of law filed on December 3, 1985, Petitioner Gregory Johnstone, a state prisoner, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On behalf of respondent, the Attorney General of the State of New York filed a memorandum of law in opposition to petitioner's application on January 21, 1986. Petitioner filed a Reply Memorandum of Law on February 4, 1986.

Petitioner's first trial on the underlying indictment resulted in a hung jury. He was tried a second time (Fraiman, J.) and was convicted on March 17, 1982 in Supreme Court, New York County, of arson in the second degree,

N.Y. Penal Law § 150.15, and burglary in the first degree, N.Y. Penal Law § 140.30. He was sentenced to concurrent indeterminate terms of imprisonment from three to nine years on each count. The Appellate Division, First Department, affirmed petitioner's conviction on December 18, 1984. Petitioner's application for Leave to Appeal to the New York State Court of Appeals was denied on April 15, 1985. State remedies have been exhausted.

On November 16, 1980, at approximately 2:30 A.M., petitioner and two accomplices pried open the door of apartment #8 in an apartment building at 115 West 143rd Street, New York City. Once inside, they set fire to the apartment. The fire totally destroyed apartment #8 and caused damage to the

apartments on the floors above. Several tenants in the building and a fire-fighter suffered injuries as a result of the fire.

In support of his application for a writ of habeas corpus, petitioner interposes a Sixth Amendment claim founded on the trial court's refusal to permit petitioner to relinquish his court-appointed counsel before trial and to conduct his own defense without the attorney's assistance. Respondent acknowledges that petitioner had invoked his constitutional right to represent himself, but contends that his request properly was denied because his intentions as expressed were not unequivocal and because his purported waiver of counsel was neither knowing nor inteligent.

Petitioner was represented in his first trial by a court-appointed attorney, Ira Van Leer. The jury failed to return a verdict and a mistrial was declared. Two months later, a jury was empaneled for a second trial on the same indictment. Mr. Van Leer remained the attorney of record for the petitioner. On January 5, 1982, the day before the commencement of the second trial, petitioner informed the court that he was dissatisfied with his present counsel and that he desired the services of a new attorney. The court denied petitioner's request. Petitioner then indicated that he wanted to represent himself at trial. In response, the court inquired into petitioner's education, age, employment and exposure to legal proceedings. (Tr.

6-7, 10). Detailing both the perils of self-representation and the comparative advantages of utilizing, cost free, the skills, training and experience of a seasoned defense attorney, the trial judge reminded petitioner of the seriousness of the crimes with which he was charged and the possible consequences of a conviction. Further, in response to the street-wise petitioner's proclamation that as a pro se defendant he would refuse to participate in the trial in his own defense and hence lay the foundations for a mistrial or reversal of the conviction (Tr. 6, 12), the trial judge explained patiently to him that he could not count on a reversal or retrial. (Tr. 6, 13). When petitioner persisted, the court conceded that he was competent

(Tr. 25), but ruled that because of his age, education and vocational and legal inexperience, he was not qualified to conduct his own defense. (Tr. 27-28). The court directed Mr. Van Leer to continue as petitioner's defense counsel (Tr. 17-22) and stated for the record that the petitioner was not proceeding pro se. (Tr. 26).

Without intending any criticism of this particular trial judge, who is well known for patience, devotion to justice and hard work, we are constrained to observe that in this era of oppressive Big Government, there is a lamentable tendency on the part of bureaucrats generally, including some judges to undertake the task of Big Daddy, and compel persons who are sui juris to do that which is in their best

interests whether they like it or not. There is an ever increasing tendency to act against individual freedom, while motivated by good intentions, based often in elitism or a perception that everyone else in the world is stupid. This "compulsory seat belts" thinking is demonstrated by much of the colloquy in this case:

The Defendant: I don't want him [Attorney Van Leer]. Why are you bothering me? I said I do not want the man point blank. I do not want him. Why you keep bugging me about it? I don't want the man.

The Court: You don't have the experience or the training to defend yourself.

The Defendant: Yes, I do. I will just sit right there. (Tr. 16).

* * * *

The Defendant: I don't want him.

The Court: That may well be, but I am not going to allow you to represent yourself. (Tr. 17).

* * * *

The Court: He is not capable of defending himself at trial.

Mr. Van Leer: He is intelligent, he reads all the minutes. He has all the minutes, he can proceed. His anger is generated towards me. (Tr. 18-19).

* * * *

Mr. Van Leer: My being here with him would only generate disruption or something. I do not want to disrupt the proceedings.

The Court: As a member of the bar and an officer of the Court, it is your duty to defend the Defendant to the very best of your ability. I know that you will do that. (Tr. 19).

* * * *

Mr. Van Leer: He may want to cross examine himself.

The Court: You are conducting this defense, not the Defendant. (TR. 21).

The Court terminated the discussion by saying:

The Court: I see no indication that the Defendant is not competent. He seems perfectly competent. I think he is being stubborn and is not thinking things through. I see no indication he is not competent. (Tr. 25).

At page 27 of the record, the prosecutor remonstrated tactfully with the Court to no avail. The Appellate Division affirmed petitioner's conviction without even discussing the point.

On January 6, 1982, before trial began and outside the presence of the jury, the petitioner asked to make the opening statement and to begin cross-examination of the witnesses. (Tr.

33-34). The court denied the request. Over petitioner's protests Mr. Van Leer conducted petitioner's defense. Petitioner engaged in colloquy with the trial judge during the course of trial, but never while the jury was present. Finally, at the close of evidence, Mr. Van Leer informed the trial judge that petitioner wished to make his closing argument personally. Although questioning petitioner's qualifications, the Court relented and permitted petitioner to make the summation. After two days' deliberation, the jury returned a verdict of guilty. The conduct of the trial was in all respects fair and petitioner's guilt was established clearly, beyond a reasonable doubt.

The Sixth Amendment guarantees

a criminal defendant not only the right to the assistance of counsel but also the corollary right to dispense with counsel and to present his defense in the manner of his choosing. See Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). This right to represent oneself against the marshalled forces of government, to undertake personally to convince a jury of one's innocence, embodies principles of individual integrity, autonomy and self-expression so fundamental to our system that its abrogation calls into question the entire fabric of an individual's innate personal liberty.

The Constitution is a seamless web of rights and liberties--not conferred but guaranteed--against the intrusive, offensive and sometimes

paternalistic presence of Big Government. When a criminal defendant elects to stand at the Bar in his own defense, and he does so knowingly, voluntarily and unequivocally, a court is bound by the Constitution to honor that election, however suicidal it may appear to be. At trial, the criminal defendant is confronted with the possible loss of his liberty, his dignity and a host of other things; on this occasion perhaps above all others, he is entitled to speak freely, to control his own future and exercise his free will. That this course may hasten and/or lengthen his incarceration is of no moment and should not concern the trial judge. The Sixth Amendment affords no lesser rights to the foolish than to the wise. If freely chosen, the

right to go to trial without counsel is protected by Constitutional, and indeed natural, law.

We next consider whether petitioner, being fully informed, deliberately and voluntarily waived assistance of counsel and unequivocally sought to undertake his own defense. The trial court did not find that he did not do so, nor is there anything in the record which would suggest such a finding. There is no indication in the trial record that the petitioner, then aged 18, was under any legal or mental disability that impaired his capacity to manage his own affairs. Indeed, his appointed counsel informed the judge that petitioner had familiarized himself with the indictment, the minutes of the first trial and other significant

documents relating to his defense. Once apprised of petitioner's intentions to reject Mr. Van Leer's free representation, even in the absence of substitute counsel, the trial judge entered into a discourse with petitioner explaining the pitfalls of self-representation and advising him to reconsider his decision. Although he found that the petitioner lacked the education, training or experience to conduct his defense skillfully, at least by contrast to his appointed counsel, the judge conceded that the petitioner was "perfectly competent" and observed that he was just being stubborn. (Tr. 25). A free American has the right to be stubborn. Under the Constitution, the inquiry should have ended there.

However benign or protective

his motives, however firmly he believed that the petitioner was "not thinking things through (Tr. 25), the trial judge should have acceded to petitioner's request. The standard in such cases is not what the judge thought was in petitioner's best interest, but what petitioner believed to be such, after being fully informed. As our Court of Appeals has observed, "even in cases where the accused is harming himself by insisting on conducting his own defense, respect for individual autonomy requires that he be allowed to go to jail under his own banner." United States v. Denno, 348 F.2d 12, 15 (2d Cir. 1965)(Waterman, J.), cert. denied, 384 U.S. 1007, 86 S.Ct. 1950, 16 L.Ed.2d 1020 (1966).

Respondent challenges the

intelligence of petitioner's election by suggesting that he chose to waive his right to counsel only because he hoped to parlay his pro se defense into a mistrial and reversal, and, ultimately, a new lawyer. At the outset, the Court observes that such inquiry into petitioner's motivations is improper, just as the cause for his claimed disenchantment with his attorney is of no proper concern to the Court when presented in his context. See United States ex rel. Jackson v. Follette, 425 F.2d 257, 259 (2d Cir. 1970). If voluntarily and unequivocally invoked before trial after being fully inquired of and informed by the Court, the right to defend pro se is absolute. See United States v. Brown, 744 F.2d 905, 908 (2d Cir. 1985).

The record here shows no misunderstanding by petitioner of the possible consequences of his decision or the absence of an intelligent waiver. The trial judge warned him on at least two occasions that his election to forego counsel could increase the likelihood of conviction. On both occasions the petitioner said he understood that risk. That petitioner's decision to defend pro se may have been precipitated by the court's proper refusal to incur trial delay in order to obtain substitute counsel at that late stage, does not diminish the genuineness, validity or singlemindedness of petitioner's election. Similarly, petitioner's equivocation as to the character of his intended defense--whether to participate

or sit inert--does not compromise his decision to go to trial without counsel.

The Court is convinced from the record as a whole that petitioner was fully aware of the possible consequences of his decision, but that he nevertheless adhered to his rejection of Mr. Van Leer's assistance. As the petitioner himself reminded the court, this is his trial (Tr. 17) and, indeed, the Constitution guarantees that his defense, should he choose to interpose one, is his defense. See McKaskle v. Wiggins, 465 U.S. 168, 173, 104 S.Ct. 944, 949, 79 L.E.2d 122 (1984); Faretta, supra 422 U.S. at 821, 95 S.Ct. at 2354. Unwanted appointed counsel, however skillful, represents no one but the perceived need of Big Government to deprive individuals of their freedom of

action, supposedly to keep the scales of Justice in balance. Those bureaucratic interests must yield to petitioner's constitutional right.

Having found that the Sixth Amendment rights of Mr. Johnstone to proceed without an attorney were violated by the trial court intentionally and after notice, we must consider what is to be done about it at this stage. As noted earlier, guilt in this case is clear. The purpose of any system of criminal justice including our own is not simply to preserve for their own sake, as tribal relics of our forebears' troubles with King John, some peculiar notions as to how criminal trials should be conducted. Rather, we seek to establish and maintain a system which with minimal social and

transactional cost will assure insofar as possible that the guilty will be convicted and punished, and that innocent people and those whose cases are doubtful will be set free. In doing this we must recognize that there is perfect trial, just as there is no perfect crime. See Delaware v. Van Arsdall, ____ U.S. ____, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674 (1986); United States v. Hasting, 461 U.S. 499, 508-09, 103 S.Ct. 1974, 1980, 76 L.Ed.2d 96 (1983).

To assure that we do not exalt theory over substance, and to protect society's interest in a practical fashion, the Supreme Court has endorsed the doctrine of harmless constitutional error. Chapman v. United States, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705

(1966). Accordingly, it should not be necessary to set aside this conviction and require a new trial of this obviously guilty felon, if, upon the record before this Court, we can say that the constitutional error was harmless beyond a reasonable doubt.

There is some difficulty with this concept. As recently as January 23, 1984 in McKaskle v. Wiggins, 465 U.S. 168, 104 S.Ct. 944, 951, 79 L.Ed.2d 122 at footnote 8, a majority of the Court, per Justice O'Connor, issued the following dictum on the subject:

> "Since the right of self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to 'harmless error' analysis. The right is

> either respected or denied; its deprivation cannot be harmless."

The premise set forth in that footnote seems hardly self-evident. Nor is it required as a holding by the facts in McKaskle. In that case, the respondent state prisoner had been permitted to proceed pro se. The trial court had appointed standby counsel to assist him. On appeal following conviction, defendant-respondent claimed that his Sixth Amendment right to conduct his own defense was violated by standby counsel's unsolicited excessive involvement. The holding of McKaskle is simply that the regulation by the trial court of the activities of standby counsel appointed to assist a defendant who is proceeding pro se will be upheld providing

no substantial right is adversely affected.

As can be seen, the footnote quoted above is not necessary to the resolution of the issues presented to the Supreme Court in McKaskle. Harmless error exists and should be found whenever it would be a useless waste of judicial resources to retry a case, as, for example, when it can be shown beyond a reasonable doubt that the constitutional violation could not have affected the outcome of the trial. Chapman, supra 386 U.S. at 22, 87 S.Ct. at 827.

On April 7, 1986 the Supreme Court decided Delaware v. Van Arsdall, ____U.S.____, 106 S.Ct. 1431, 89 L.Ed.2d 674. There, in an opinion by Justice Rehnquist joined by three

members of the majority in McKaskle, the Court employed harmless error analysis to uphold the state court conviction of the respondent whose confrontation right under the Sixth Amendment had been violated. The court conceded that the trial court improperly had restricted cross-examination designed to show bias, but concluded that this clearly erroneous ruling could be found to be "harmless in the context of the trial as a whole." Id. at_____, 106 S.Ct at 1433. As might be anticipated, the majority in Van Arsdall failed to cite or comment upon footnote 8 in the McKaskle case. It would seem at least to this writer that the opportunity to show bias on the part of prosecution witness by cross-examination is a more valuable and more practical Sixth

Amendment right than the right with which we are presently concerned; a fortiori if an unfair and improper curtailment of cross-examination can be harmless error in a Sixth Amendment context, then an unfair and improper denial of the right, in the words of the late Judge Waterman, to "go to jail under his own banner" should also be susceptible to harmless error analysis.

Our task would be easier if the Supreme Court would refrain entirely from footnotes, and curtail gratuitous observations (dicta) not required by the case. Our situation would be improved even more if subsequent decisions inconsistent with such dicta would cite and disapprove these prior expressions. Whatever the reasons of practicality that prevent the Supreme Court from

doing this, we conclude that under the current Sixth Amendment jurisprudence as reflected in Van Arsdall, the clear constitutional violation present in this case is susceptible of harmless error analysis notwithstanding the dictum in McKaskle. Also, in the total context of Johnstone's case, denial of his right to represent himself was harmless error beyond a reasonable doubt.

For this reason the petition is denied. The Clerk shall enter final judgment.

Because this petition presents a serious issue upon which reasonable persons could differ, the Court directs that a certificate of probable cause to appeal shall issue pursuant to 28 U.S.C. § 2253 and Rule 22(b) of the Federal Rules of Appellate Procedure. With no

irony intended, the Clerk of the Court of Appeals, on receipt of a Notice of Appeal, is respectfully requested to appoint counsel for petitioner. See 28 U.S.C. § 1915(a); Rule 24(a), F.R.App.P.

So Ordered.

EXHIBIT D

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fourth day of December one thousand nine hundred and eighty-six.

Present: HON. ELLSWORTH A. VAN GRAAFEILAND

HON. THOMAS J. MESKILL

HON. JON O. NEWMAN

Circuit Judges,

----------x

GREGORY JOHNSTONE, :

Petitioner-Appellant, :

v. : No. 86-2199

WALTER J. KELLY, Superinterintendant, Attica Correctional Facility. :

Respondent-Appellant.

----------x

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the JUDGMENT of said District Court be and it hereby is REVERSED and the action be and it hereby is REMANDED to te said district court for further proceedings in accordance with the opinion of this Court with costs to be taxed against the appellee.

ELAINE B. GOLDSMITH
CLERK,

By: /s/ EDWARD J. GUARDARO,
EDWARD J. GUARDARO,
DEPUTY CLERK

EXHIBIT E

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK PART: 57

THE PEOPLE OF THE STATE OF NEW YORK,	:	IND.
-against-	:	110/81
GREGORY JOHNSTONE, Defendant.	:	Charge: Arson First Degree
	:	Trial

111 Centre Street
New York, New York
January 5, 1982

B E F O R E:

THE HONORABLE ARNOLD FRAIMAN, Justice and a Jury

A P P E A R A N C E S:

(For the People)
DONALD MATTHEWS
ASSISTANT DISTRICT ATTORNEY

(For the Defendant)

IRA VAN LEER, ESQ.

Linda Pazzani
Official Court Reporter

[Tr. 2] COURT CLERK: The People of the State of New York against Gregory Johnstone. Indictment Number 110 of 1981.

MR. VAN LEER: Judge, it is the Defendant's desire to go without a lawyer, or without me I would say. He sought another lawyer. I assume he doesn't want me to try the case.

THE COURT: Mr. Johnstone?

THE DEFENDANT: Yes, the papers are here. I got papers here where the man said something was wrong with me.

I submitted this information to him, which is not true. The man told me -- Eileen Bush was my witness three months ago. I am on trial. She is not a witness. I got two more witnesss. I want a new lawyer.

Everytime I was getting denied,

he keeps telling me he might get me out on my own recognizance. I don't want him no more.

THE COURT: Well, you made that application, I guess, before Judge Roberts yesterday?

THE DEFENDANT: What?

THE COURT: You were before Judge Roberts yesterday?

[Tr. 3] THE DEFENDANT: Yes.

THE COURT: And you asked him for another lawyer?

THE DEFENDANT: I have been asking him.

THE COURT: He denied that application?

THE DEFENDANT: Yes, he has been denying me all through my trial.

THE COURT: You went to trial last year?

THE DEFENDANT: Yes, with him. I don't want to go with him.

THE COURT: Well, apparently the Judge that tried the case before, she also said you couldn't have a new lawyer?

THE DEFENDANT: Yes.

THE COURT: Why should I grant your application now Mr. Johnstone, after all these other judges have denied your application?

THE DEFENDANT: I am not going to go to trial with him. I am not going to represent myself I will just be there.

THE COURT: You understand, Mr. Johnstone, that you are in serious trouble because you are charged with a very serious crime.

THE DEFENDANT: I didn't do it.

[Tr. 4] THE COURT: If you are convicted, you can go to jail for up to 15

years.

THE DEFENDANT: I know that.

THE COURT: I mean, this is a very important matter for you.

THE DEFENDANT: If I get convicted --

THE COURT: So, it is in you interest to do everything you possibly can to defend yourself. Because if you do not it is going to be too late later on for you to say, well, maybe I should have defended myself a little bit, if you are convicted.

THE DEFENDANT: Yes, that's why I want to get rid of him.

THE COURT: He is an experienced lawyer.

THE DEFENDANT: Why are you making me keep something that I do not feel comfortable with?

THE COURT: Why is it you do not want Mr. Van Leer to represent you?

THE DEFENDANT: I will show you. I don't want him for that reason.

THE COURT: May I see the file in this case?

COURT CLERK: Yes, Your Honor.

THE COURT: You have given me a motion that Mr. Van Leer made in your behalf in which he said [Tr. 5] that he was going to defend you on the ground that you were not responsible for your acts because of mental problems.

THE DEFENDANT: I didn't give him that information. He said I submitted that information. I didn't submit it.

THE COURT: Apparently, there was something in that regard that Mr. Van Leer thought might support that defense.

What you have to understand,

Mr. Johnstone, is that Mr. Van Leer was doing this for your benefit.

THE DEFENDANT: I don't want him.

THE COURT: If you do not want that defense put in, he is not putting it in on trial, as I understand it, so that is not going to be a factor in this trial. He is not using that on this trial. Apparently he was going to use it on the last trial. Whether he did or not, I don't know.

MR. VAN LEER: It was not imposed at the last one either.

THE COURT: He is not going to use that defense, he just did it to protect you.

THE DEFENDANT: He can't protect me. There ain't nothing wrong with me. I want to go to trial [Tr. 6]

but I do not want to go with him. If I go by myself, I am not going to pick no trial. I am not going to cooperate with it.

THE COURT: Do you understand what is going to happen if you do that?

THE DEFENDANT: I will come down on appeal.

THE COURT: On an appeal?

THE DEFENDANT: Yes.

THE COURT: The appeal is not going to help you any, because what is going to happen, there will be a chance that you will be convicted if you do not put in a defense.

THE DEFENDANT: I won't.

THE COURT: Than if you did put in a defense. I won't grant you another lawyer. Mr. Van Leer is competent lawyer.

THE DEFENDANT: I am not taking him, that is all. If I got to represent myself, I will, just be there. Forget about it.

THE COURT: How old are you?

THE DEFENDANT: Eighteen.

THE COURT: How much education had you had?

THE DEFENDANT: I don't know.

THE COURT: When did you leave school? How [Tr. 7] long ago?

THE DEFENDANT: Before I came here, I was going to school.

THE COURT: How long ago was that?

THE DEFENDANT: Twelve months ago.

THE COURT: Were you about the ninth or tenth grade?

THE DEFENDANT: No, it was no

grade. I was just in a class.

THE COURT: What school were you in?

THE DEFENDANT: Veritas, it was a program. They had me going to school.

THE COURT: A program?

THE DEFENDANT: Yes.

THE COURT: Had you worked at all?

THE DEFENDANT: Yes.

THE COURT: What kind of work have you done?

THE DEFENDANT: I don't know the name of it.

THE COURT: Mr. Johnstone, it really isn't in your interest to do this because you are very young and you have your whole life ahead of you. This is a very, very serious crime that you are charged with. You can go to jail for

about as long as you have been on this earth. Do you understand [Tr. 8] that, if you are convicted?

THE DEFENDANT: So what are you telling me?

THE COURT: I am telling you you have to do everything you possibly can to defend yourself.

THE DEFENDANT: I am trying to get a new lawyer. I am going by myself.

THE COURT: You tried to do that. I denied your application because, at this stage, I cannot grant that application. It has already been turned down by a whole series of other judges. I see no reason to change their decision.

Now, in life you accept certain things and you make the best of it. You cannot have everything your own way. You cannot say, if that is the rule, I am not

going to play the game. You do the best you can.

THE DEFENDANT: So I am going by myself.

THE COURT: You understand what that is going to mean?

THE DEFENDANT: Whatever happens, happens.

THE COURT: Think of how you will feel ten years from now and you are convicted when you say whatever happens, happens.

Maybe with Mr. Van Leer, you could have won [Tr. 9] the case.

THE DEFENDANT: My last trial was lousy, he was talking about feet and distances. He was not talking about nothing else. I do not feel comfortable with him.

THE COURT: You were not

convicted?

THE DEFENDANT: Judge Roberts, whatever his name is, he lied too. He said it was ten to two conviction on my behalf. It was ten to two. Ten people said they could not come to a decision. Two people said it is a possibility that they could come to a decision. So how can it be ten to two decision?

THE COURT: It does not make any difference what it was. What you have to understand is that Mr. Van Leer was your lawyer then, and he accomplished that for you. You were not convicted.

THE DEFENDANT: I was telling him he was not doing nothing. I was telling him what to do.

THE COURT: Well, somebody did something, maybe you ought to try telling him what to do. It did not work out so

bad last time.

THE DEFENDANT: I know. But I am not taking chances with him.

[Tr. 10] THE COURT: What you are saying now is you are giving up?

THE DEFENDANT: I am going by myself.

THE COURT: That means you are giving up?

THE DEFENDANT: I will do it by myself.

THE COURT: How can you do it by yourself?

THE DEFENDANT: I read the minutes every night. I got papers. I was indicted. I know that they said I caused physical injury to a person. On my way out, a lady testified to that. I got my medical report, whatever that thing is. The lady said she was treated in Harlem

Hospital.

As soon as I get the trial to show me some papers. I don't believe what they say, David Smith came to a store and showed him a gun. I don't believe that. I don't believe none of that.

THE COURT: Mr. Johnstone, you just don't have the qualifications, unfortunately, to defend yourself.

Have you ever seen a trial other than your own trial, the last trial?

THE DEFENDANT: No.

THE COURT: You don't have any special training or education, you are only eighteen [Tr. 11] years old and you are faced with a very, very serious crime.

Now, I would like to accommodate you, if I could. But I do not see how I can help you. I cannot grant you that application for a new lawyer at

this stage, in view of the fact Judge Roberts, just yesterday, denied your application. I cannot overrule him, unless there are some other facts that would warrant it. So I cannot do that.

THE DEFENDANT: So, let's proceed with the trial.

THE COURT: I hate to proceed with a trial with somebody who isn't properly represented. Mr. Van Leer is a very competent lawyer.

THE DEFENDANT: I don't want him.

THE COURT: You keep saying that, but --

THE DEFENDANT: He is not going to be sitting next to me.

THE COURT: Mr. Johnstone, you can't defend yourself. You just don't have the qualifications and you are

running a risk.

THE DEFENDANT: You will have to do something.

THE COURT: What are we going to do?

THE DEFENDANT: Get a new lawyer.

[Tr. 12] THE COURT: I can't get you a new lawyer.

THE DEFENDANT: A motion to dismiss this case.

THE COURT: I do not see any basis to dismiss the case.

THE DEFENDANT: All the witnesses lied.

THE COURT: I don't know that they lied.

THE DEFENDANT: You didn't look at the minutes.

THE COURT: Let your lawyer try

to show that they lied.

THE DEFENDANT: I will do it myself. If I go to trial, it is not going to be with him. If you make me go by myself, I will be sitting here. He will pick out his fourteen Jurors and I will not pick out nobody. You cannot force me either.

THE COURT: I can't force you. But what will happen, we will go to trial, if you don't try to help yourself, the chances of your being convicted are going to be high.

THE DEFENDANT: I know.

THE COURT: Is that what you want?

THE DEFENDANT: I will be convicted, but I will come down and I will get another lawyer.

[Tr. 13] THE COURT: I don't

think you will.

THE DEFENDANT: I think I will.

THE COURT: You are taking an awful chance.

THE DEFENDANT: I am going to take it.

THE COURT: Do you know how long fifteen years is?

THE DEFENDANT: Yes, it is a long time. I won't get fifteen years.

THE COURT: You may very well.

THE DEFENDANT: If I did get it, it wouldn't make a difference. I will be out in 1984.

THE COURT: You will be out?

THE DEFENDANT: In 1984.

THE COURT: Why do you say that?

THE DEFENDANT: Because I will be down on my appeal in three years. I got good grounds to come down on appeal.

THE COURT: Suppose you lose the appeal, you might lose the appeal.

THE DEFENDANT: If I lose it, I will deal with it.

THE COURT: I don't know what I can say to you. I have been around a long time, I have a son that is older than you are. I do not consider him [Tr. 14] fully capable of managing his own affairs at that point.

I really do not think, in this serious trouble that you are in, that it would be the wisest course for you to try to defend yourself. You have to make due the best you can, and that is to cooperate with Mr. Van Leer in presenting the best defense you can.

THE DEFENDANT: That man ain't going to represent me. He knows I don't want him.

THE COURT: He is sitting here. He is sitting here and listening to what you are saying. He heard you say you do not want him.

THE DEFENDANT: I told him not to go and come to Court. I am not paying him.

THE COURT: He has a legal duty and obligation to defend you to the best of his ability. He is not interested in convicting you. He managed to get you a hung Jury last time.

THE DEFENDANT: Yes, but if I was represented right, I wouldn't have a hung Jury. I would of had my verdict already.

THE COURT: It seems to me, Mr. Johnstone, that what you ought to do is work out a compromise [Tr. 15] with Mr. Van Leer. You make suggestions to him as

to how he should conduct your defense, and if he thinks it is consistent with his standards to conduct your defense in that fashion, I am sure he will go along with you and conduct your defense in whatever way you want him to.

He has the skills, the training, the education and the experience to conduct a decent defense for you. You do not have any of those things.

THE DEFENDANT: I would be calling him. He doesn't pay attention to me. By the time I finished making a statement then he comes over to me.

THE COURT: He heard what you said and heard why you are unhappy with him, maybe he will pay more attention to you this time.

THE DEFENDANT: I don't want

him. I got a right to another lawyer.

THE COURT: You don't have a right to another lawyer. That is what I am trying to tell you. I cannot give you another lawyer.

THE DEFENDANT: Well, I don't want him. You can't bring me to trial with someone I don't feel comfortable with.

[Tr. 16] THE COURT: Yes, I can.

THE DEFENDANT: Well, bring me to trial. He won't sit next to me.

THE COURT: He will sit wherever I ask him to sit.

THE DEFENDANT: All right, bring me to trial then.

THE COURT: I say you have to think about this.

THE DEFENDANT: I don't want him. Why are you bothering me. I said I

do not want the man point blank. I do not want him. Why you keep bugging me about it. I don't want the man.

THE COURT: You don't have the experience or the training to defend yourself.

THE DEFENDANT: Yes, I do. I will just sit right there.

THE COURT: Is that what you want to do, sit right there and get convicted?

THE DEFENDANT: You can't you give me another Judge, another lawyer.

THE COURT: Mr. Johnstone, you have a right, if you want, to not put in any defense at all, to do absolutely nothing. Let the District Attorney [Tr. 17] prove his case. If he does not prove a case against you, even though you did not do anything at all, you would still be

entitled to an acquittal. Do you understand what an acquittal is? You would be entitled to a verdict of not guilty even if you did nothing at all. The District Attorney still has to prove your guilt beyond a reasonable doubt, do you understant that?

THE DEFENDANT: Yes.

THE COURT: So, if you want to do it, I don't advise it, I will ask Mr. Van Leer to sit next to you, the two of you can sit there and do absolutely nothing.

THE DEFENDANT: Why does he got to be in the courtroom? I don't want him in the courtroom.

THE COURT: I will decide who is in the courtroom. This is my courtroom.

THE DEFENDANT: Well, this is my trial.

THE COURT: It is your trial. I will decide who is in this courtroom. If you do not want him to say anything --

THE DEFENDANT: I don't want him.

THE COURT: That may well be, but I am not going to allow you to represent yourself. I am [Tr. 18] to ask him to sit next to you. You decide what you want to do during the trial. He will do what you want him to do. If you do not want him to do anything at all, that is up to you. All right, Mr. Johnstone?

Mr. Van Leer, I am directing you to sit next to the Defendant and do your best to represent him to the best of your ability.

MR. VAN LEER: Your Honor, the Defendant has other reasons, whatever his reasons are, he has already had certain

frames or references predicated on a whole history of his life. You have to read that history to understand his thoughts. His has a thought pattern and that pattern is what formulates these ideas.

THE COURT: That may well be.

MR. VAN LEER: That is something that it is his way of life that he has lived, his background, his experience. He has already formulated these ideas.

THE COURT: He is not capable of defending himself in a trial.

MR. VAN LEER: He is intelligent, he reads all the minutes. He has all the minutes. He can [Tr. 19] proceed. His anger is generated towards me. It is created towards me, and I don't think what went on in the trial, the fact

that he was so pleased with everything that went on.

On one occasion he told me that he had won $10. He gave me ten dollars to hold for him at the end of the last case. I just gave it back to him yesterday. He gave me the money in November I gave him back the money yesterday.

We had a very friendly descent lawyer/c'ient relationship. His attitude, how it changed somewhere between the conclusion of the other case, I don't know.

I sent an investigator name Wade, and at that point, he said to that investigator he wanted a new lawyer. What generates this attitude towards me now -- Remember, Judge, I have three other cases waiting. My being here with him would only generate disruption or something. I

do not want to disrupt the proceedings.

THE COURT: As a member of the bar and an officer of the Court, it is your duty to defend the Defendant to the very best of your ability. I know that you will do that.

[Tr. 20] I understand your reluctance to participate in this trial in view of the Defendant's expressed desire to be assigned another lawyer.

I turned down that application and I will direct you to participate in this trial consistent with the Defendant's wishes. If he does not want you to actively participate in the trial, that is his wish and you can make that known on the Record that is what his desire is.

MR. VAN LEER: That is not truly his wish. His wish is to have another

lawyer.

THE COURT: I am aware of that. I turned that application down.

Now, let's proceed.

MR. VAN LEER: Well, then, it is a sham, the man should be represented by a lawyer.

THE COURT: You are his lawyer, Mr. Van Leer.

MR. VAN LEER: If I am going to sit here and not participate he is without a lawyer.

THE COURT: That is the Defendant's prerogative, Mr. Van Leer.

MR. VAN LEER: I heard all the witnesses. There were two alleged eyewitnesses that will testify to certain events. It is a circumstantial [Tr. 21] evidence case. These witnesses will testify to certain events.

Now, it becomes crucial to him that someone cross-examine those witnesses to find out where the truth is.

THE COURT: You may explain that to him. If he does not want you to cross-examine them, that is his prerogative. If he wishes you to remain silent, he has that right.

MR. VAN LEER: He may want to cross-examine himself.

THE COURT: You are conducting this defense, not the Defendant.

MR. VAN LEER: If I am conducting this Defense, then I must run it in a manner I feel is legally proper. If he runs it, it will be Johnstone on evidence, and that is not the rule.

THE COURT: Mr. Van Leer, if he does not want you to actively participate, then you may state, on the

Record, that the Defendant does not wish you to [Tr. 22] cross-examine a particular witness, and that will be it. If he does not want you to make an opening statement to the Jury, you may state that the Defendant has indicated he does not wish you to open to the Jury. If he does not want you to sum up, you may so state at the appropriate time. You may advise the Defendant it is in his interest, if you think so, to cross-examine the witness and to open or to sum up, if you believe that those steps are in the Defendant's interest. If he does not choose to follow your advise, he is the Defendant, he is on trial, and he has the right to make that election.

I will direct you to participate to the extent I have indicated and to sit a Counsel table with

the Defendant.

MR. VAN LEER: There is a basic concept in the law in reference to a 730 examination. Now, 730 examinations are all predicated pursuant to the Criminal Procedure Law related to whether the Defendant aids in his defense, can the Defendant aid in his defense.

THE COURT: Has that application been made in that connection?

MR. VAN LEER: Well, if we are going to come to this point now where I must raise the question if he did not aid in his defense then the 730 aspect will have been germane at this point, and should be.

[Tr. 23] THE COURT: I do not understand that?

MR. VAN LEER: Well, 30.05, and 730, 730 relates to being able to

communicate, set up defense.

THE COURT: You are talking about a motion that you propose to make pursuant to some section of some statute?

MR. VAN LEER: We are talking about what the Judge's ruling is to me, if the Judge says sit down next to the Defendant, the Defendant will say to you, or the only thing he may say to me is don't do this, don't do that. Therefore, there is a failure of my communication under 730 to get a defense. Where the whole principle o 730 relates to the primary purpose of being able to communicate with the Defendant.

THE COURT: I have seen no indication that the Defendant is incompetent, or in any way, unable to communicate with his lawyer.

What he has indicated is a lack

of desire to communicate with his lawyer. He is making a voluntary decision, apparently, that he does not want to communicate with Counsel.

MR. VAN LEER: I ask the Court to inquire then as to see whether that is intelligently [Tr. 24] authenticated.

THE COURT: I have been doing that for the last fifteen minutes.

MR. VAN LEER: You are putting me in a positic to sit and defend and not be able to communicate.

THE COURT: I did not say you could not communicate, I said --

MR. VAN LEER: He is not going to talk to me.

THE COURT: I don't know whether he is going to talk to you or not. He will convey instructions to you that he does not want you to do certain things or

he does.

MR. VAN LEER: That is where the issue comes in under 730.

THE COURT: I do not follow you and we do not agree.

Let's proceed please.

MR. VAN LEER: Let me ask a question then. Will we talk to one another?

THE DEFENDANT: I don't want you next to me.

THE COURT: I heard him, I already ruled on that.

Mr. Van Leer, please be seated.

MR. VAN LEER: You are putting me in jeopardy [Tr. 25] I will not be put in jeopardy in this courtroom. I have certain right also.

THE COURT: I will direct you to be seated. I do not understand what

jeopardy you are being placed in?

MR. VAN LEER: He will forcefully not want me here.

THE COURT: The Court Officers are here, I do not think you are in any physical jeopardy. Be seated, please.

MR. MATTHEWS: Your Honor, first of all, I would just like to point out for the Court some information, since the Court just got this case yesterday.

This man has had a 730 examination and he has been found competent.

THE COURT: I see no indication that the Defendant is not competent. He seems perfectly competent.

I think he is being stubborn and is not thinking things through. I see no indication he is not competent.

MR. MATTHEWS: Your Honor, I

would like to clarify, in my own mind, perhaps I am not understanding [Tr. 26] fully what the Court said -- The Defendant is now going to proceed in this trial pro se, on his own?

THE COURT: He is not proceeding pro se, Mr. Van Leer is his attorney. I made that absolutely clear.

MR. MATTHEWS: Yes, you Honor.

THE COURT: I will instruct you to participate in this trial to the extent the Defendant wishes. If you feel that he wishes you to violate some standard that you have, make that known to the Court, not in the presence of the Jury.

MR. VAN LEER: Let's get it so we understand what we are doing.

THE COURT: I think we understand what we are doing.

MR. VAN LEER: The only issue

now is, at least the issue as I see it, is providing the Defendant is not going to communicate with me --

THE COURT: I don't know whether he is going to communicate with you or not. Apparently you haven't made any effort to communicate with him.

The first step is to select a Jury and inquire whether he wishes that. That is the first step you ought to get ready for.

[Tr. 27] MR. VAN LEER: We must first talk to one another.

THE COURT: Why don't you make an effort to privately talk with your client in this case.

MR. VAN LEER: I will ask him in open Court. Do you wish to talk to me?

(Off the Record discussion.)

THE COURT: Bring the Jury in,

please.

MR. MATTHEWS: There is something else, most respectfully, and I have a great deal of respect for the Court.

I think, your Honor, that the question should be clarified as to whether --I am sorry, the Court is obviously denying the Defendant's right to proceed pro se.

I think, your Honor, there may be some problem with that. I think he may have the right to proceed pro se.

THE COURT: I read the cases. I do not think that the Defendant has the requisite education, background or training or experience to appear, pro se, in this case.

The leading cases, People against McIntyre, and the Court in this

case determined the Defendant's [Tr. 28] competence to waive Counsel. The Court made proper inquiry to the Defendant's age, education, occupation annd previous exposure to legal procedures.

The Record has indicated that the Defendant is eighteen, he has had scarecely any formal education so far as I can ascertain, he has no known occupation and he has virtually no previous exposure to legal procedures, except for the first trial. I do not think that qualifies him to represent himself.

I don't think he can knowingly waive his rights to Counsel.

MR. MATTHEWS: I am not disagreeing with the Court's factual findings.

THE COURT: Let's bring the Jury in, please.

(Whereupon the Jury entered the courtroom.)

THE COURT: I am sorry, ladies and gentlemen, for the delay this morning. We had some legal matters that we had to cope with before we commenced our Jury selection procedure.

For those of you who are unfamiliar with the process, what we are doing this morning is selecting a Jury in a criminal case. It is called the voir dire procedure. It's purpose is to select twelve completely fair and impartial Jurors.

No. 87-1706

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

WALTER J. KELLY, Superintendent, Attica Correctional Facility, and STATE OF NEW YORK,

Petitioners,

—against—

GREGORY JOHNSTONE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

APPENDIX IN OPPOSITION

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[Transcript ("Tr.") 32]
SUPREME COURT OF THE
STATE OF NEW YORK
COUNTY OF NEW YORK
PART: 57

THE PEOPLE OF THE STATE OF NEW YORK	:	Indictment No. 110/81
- against -	:	Charge: Arson First Degree
GREGORY JOHNSTONE, Defendant	:	Trial

111 Centre Street
New York, New York
January 6, 1982

B E F O R E:

THE HONORABLE ARNOLD FRAIMAN, Justice and a Jury

A P P E A R A N C E S:

(SAME AS PREVIOUSLY NOTED)

COURT CLERK: Case on trial, the People of the State of New York against Gregory Johnstone, Indictment Number 110 of 1981.

THE COURT: Please bring the Jury in.

MR. VAN LEER: Before the Jury comes in, the Defendant wants to make a statement.

[Tr. 33] THE COURT: Yes, Mr. Johnstone?

THE DEFENDANT: I want to do some speaking myself.

THE COURT: What do you mean by that?

THE DEFENDANT: Talking to the witnesses.

THE COURT: You want to cross-examine the witnesses?

THE DEFENDANT: Yes.

THE COURT: Well, I would prefer that you did it through you [sic] lawyer, Mr. Johnstone. It is not the usual practice to have a Defendant himself examine witnesses.

What I suggest you do is have a pad and a pencil and write out the questions that you think should be put to the witness. You can hand them to your lawyer. Before he finishes questioning each witness, I will ask him to consult with you to find out what additional questions you think he should ask the witness.

That seems to be a better way to proceed because he can phrase the question properly so it will be admissible and will not be an objectionable question. It will give you a chance to say however you think the question should be put to the witness.

[Tr. 34] Let's try it that way, and see how it works out.

MR. VAN LEER: He wants to open.

THE COURT: No, you will make

the opening statement.

MR. VAN LEER: He says he wants to open.

THE COURT: I just said you will make the opening statement, Mr. Van Leer.

Bring the Jury in.

(Whereupon, the Jury enters the courtroom.)

THE COURT: Good morning, ladies and gentlemen. The Record should reflect it is now twenty minutes after 10:00. Juror Number Five has not appeared. I will ask the first alternate Juror to take the place of Juror Number Five. And, madame, would you move up to the alternate seat. Please have that Juror report to me at the end of the session today.

COURT CLERK: Yes, your Honor.

THE COURT: Ladies and gentle-

men, we are about to begin the trial of the case about which you heard a few details during the process of Jury selection.

Before the trial itself begins, there are a [end of transcript page]

[Tr. 414]
SUPREME COURT OF THE
STATE OF NEW YORK
COUNTY OF NEW YORK
PART: 57

THE PEOPLE OF THE STATE OF NEW YORK	: Indictment No. 110/81
- against -	: Charge: Arson First Degree
GREGORY JOHNSTONE,	:
Defendant	: Trial

111 Centre Street
New York, New York
January 8, 1982

B E F O R E:

THE HONORABLE ARNOLD FRAIMAN,

Justice and a Jury

A P P E A R A N C E S:

(SAME AS PREVIOUSLY NOTED)

[Tr. 508] THE COURT: All right, tell Mr. Smith he can go home.

THE DEFENDANT: I am saying, the witnesses that testified were not not [sic] witnesses.

THE COURT: What witnesses?

THE DEFENDANT: Miss Larry and Miss Mills.

THE COURT: They weren't your witnesses? I don't know whose witnesses they were. They were called by your lawyer. I gather he consulted with you before he called them.

MR. VAN LEER: He want [sic] to sum up himself, he does not want me to do it.

THE DEFENDANT: I want to call Miss Xavier to come to Court to testify, I was going to school and working to bring insurance policies, and Mr. David Satterfield.

THE COURT: If you can get them here by Monday, I will permit it.

THE DEFENDANT: I want Mr. Tally.

THE COURT: You can have whoever you want but you will have to get them here by Monday. I am not going to put the case over beyond Monday.

Anything else this afternoon?

MR. VAN LEER: Mrs. Pearce is outside.

[Tr. 512] summations on Monday.

I am sorry you had to stay and be sent home without any further testimony, but I didn't know that we were not going to have additional testimony this afternoon.

So, enjoy your weekend and we will all see you on Monday morning at 10:00. The Jury is now excused.

(Whereupon, the Jury was excused.)

THE COURT: Mr. Johnstone, with respect to your request to sum up yourself, let me say at the outset, if that is definitely what you want to do after discussing it with your attorney, and after you hear what I have to say, I will permit you to sum up by yourself.

I think it would be a terrible mistake on your part -- Just listen to me. I am going to let you do it if you

want to do it. But I think it would be a terrible mistake on your part, your attorney has presented the case in your behalf. He has cross-examined the witnesses who have been called by the District Attorney, diligently. He has a certain number of points, I am sure, that he has in mind to argue to this Jury.

[Tr. 513] I am not prepared to suggest that the Jury is going to find in your favor because I don't know how this Jury is going to find.

But it seems to me, in the basis, as the case has been presented, there certainly is a possibility that the Jury is going to find in your favor. Whether it will or not, I don't know. I never have been able to predict how cases will come out with any accuracy. But I think that the chances of

the Jury finding in your favor will be severely diminished if you sum up yourself.

You have neither the experience nor the speaking ability, nor the legal training to be able to present your arguments in the best possible light.

I say, I think you would be making a grave mistake if you choose to do this. But, if you want to sum up yourself, I am prepared to permit you to do so, if that is what you want to do.

THE DEFENDANT: Yes, I want to.

THE COURT: You can think about it over this weekend.

THE DEFENDANT: I made my mind up.

THE COURT: I suggest you think it over because you have a great deal at stake here. As [Tr. 514] I told

you at the outset of this case, your whole future is at stake or a substantial part of it, depending upon how this case comes out.

You are a young man and it seems to me that you ought to give various heed to what advise [sic] your attorney gives you and what I have had to say, but you don't have to. I want to stress that to you. You can make up your own mind.

THE DEFENDANT: Thank you.

THE COURT: The only thing I want to tell you, if you do sum up yourself, you must limit yourself to what the evidence has been in this case.

You cannot say anything in your summations about anything that is not in the Record in this case. In other words, you cannot talk about any of these papers that I have not allowed

to go into evidence. You cannot give your version of what happened. You cannot tell the Jury where you were or what you were doing.

THE DEFENDANT: I have to.

THE COURT: Do you understand that?

THE DEFENDANT: When I give my summation, I am going to tell them how, when I came on the block, and the police came to me, and all of that, [Tr. 515] I am going to tell them that I did not run from the police. I gave them my mother's address. I will let them know I was at Veritas and they came a couple of times and arrested me. I am going to let them know all of this here.

THE COURT: You cannot do that.

THE DEFENDANT: If he was speaking, he would say it, right? He said it at the last trial.

THE COURT: He can only say what is in the Record in this case.

THE DEFENDANT: This is in the Record.

THE COURT: I don't know anything in the Record about your being at Veritas.

THE DEFENDANT: You don't even know my case.

THE COURT: All I know is what I heard from the witnesses, Mr. Johnstone. All I know is what I heard from the witnesses and that is all.

THE DEFENDANT: I am telling you I was in Veritas, I was in Veritas.

THE COURT: Mr. Johnstone, you may have very well been in Veritas, but since you have not testified yourself, that is not before the Jury that you were in Veritas.

THE DEFENDANT: They will

know. Are you [Tr. 516] going to tell me to stop talking?

THE COURT: Yes.

If you tell me you are going to say things like that, you are not going to sum up, it is as simple as that.

THE DEFENDANT: Okay, thank you.

THE COURT: Don't try to play fast and loose with me and try to use your summation to say things that are not in evidence.

You are getting very close to throwing to the wind all the good that Mr. Van Leer has done for you during the course of this trial. You want to throw that out the window in just a few minutes through your own summation. That is up to you.

THE DEFENDANT: I am giving my own summation.

THE COURT: That is what you are risking.

We will recess until 10:00 Monday morning now.

(Whereupon, the Court was in recess until January 11, 1982 at 10:00 A.M.)

[Tr. 517]
SUPREME COURT OF THE
STATE OF NEW YORK
COUNTY OF NEW YORK
PART: 57

THE PEOPLE OF THE STATE OF NEW YORK	:	Indictment No. 110/81
- against -	:	Charge: Arson First Degree
GREGORY JOHNSTONE,	:	
Defendant	:	Trial

111 Centre Street
New York, New York
January 11, 1982

B E F O R E:

THE HONORABLE ARNOLD FRAIMAN, Justice and a Jury

A P P E A R A N C E S:

(SAME AS PREVIOUSLY NOTED)

COURT CLERK: Case on trial continued, the People against Gregory Johnstone.

The Defendant, his Counsel and

the Assistant District Attorney are present. Jurors are not present, your Honor.

MR. VAN LEER: The witness should have been here. I will go and look. He said he would be [Tr. 518] here at 9:30 or a quarter to 10:00 this morning.

THE COURT: What is he going to testify to?

MR. VAN LEER: Alfred Brooks is with the New York Property Insurance Underwriters Association, 161 Williams Street, New York. He will testify as to the coverage of fire insurance of Donald Mitchell and what he is supposed to bring forth is his application for the insurance recovery in reference to the fire and insurance company's rejection.

THE COURT: I will not take any testimony about the insurance com-

pany's rejection about the application.

Do you want to stipulate about the insurance, do you know what the insurance coverage was?

MR. MATTHEWS: I don't know.

MR. VAN LEER: He said it was $3,000.

MR. MATTHEWS: That is what the man said.

THE COURT: Who said?

MR. MATTHEWS: Mr. Mitchell said.

THE COURT: Did they confirm it was $3,000?

MR. VAN LEER: On the telephone, yes.

THE COURT: What is he going to add, then?

MR. VAN LEER: Other than the fact it has [Tr. 519] not been paid --

THE COURT: That I will not

allow. It is totally irrelevant. I do not see the fact that the insurance company has made an independent determination that they are not going to pay on the policy, that certainly is not admissible in this Court.

MR. VAN LEER: The Defendant has been asking for a Ms. Reid, who was a person working for Project Real, and the investigator spent the entire weekend trying to locate this Project Real. The Defendant gave an address on 149th Street and Third Avenue.

The investigator has been to 149th Street and Third Avenue and checked with the telephone company and checked with the 40th Precinct. No one can seem to locate this Project Real. So he has not located Ms. Reid.

As to James Satterfield, he has made an effort to find him. He

checked with the Welfare Department, checked with other people at 111 West 143rd Street and at 115 West 143rd Street. He could not find him either.

The Defendant says he is ready for summation. The fact we cannot get these witnesses, he is ready [Tr. 520] to sum up.

THE COURT: Do you want to go ahead without the witness?

MR. VAN LEER: That is what he says.

THE COURT: Mr. Johnstone, have you thought over what I said to you?

THE DEFENDANT: I have nothing else to say.

THE COURT: You still want to sum up yourself?

THE DEFENDANT: Yes.

THE COURT: Do you understand the risks you are taking with this?

THE DEFENDANT: Yes.

THE COURT: Giving up a very valuable right, in essence, where your lawyer has an opportunity to make all arguments that he is prepared to make in your behalf, and you are giving that up to sum up by yourself.

Do you definitely want to do that to yourself?

THE DEFENDANT: Yes.

THE COURT: Have you thought about it?

THE DEFENDANT: Yes.

THE COURT: Well, I again want to advise you. I am doing this mainly for the Record now, because I have advised you of this on Friday as well. I think [Tr. 521] this is a terrible mistake on your part. It is one of the most important phases of the trial where the case can be won or lost, generally.

And, your attorney has presented this case with certain strategy in mind. I am sure he is prepared to sum up, following through on the trial strategy that he has applied throughout the case.

You are losing the opportunity of availing yourself of his summation by insisting on summing up yourself. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: You still want to sum up yourself?

THE DEFENDANT: Yes.

THE COURT: All right, you also understand that in summing up you must limit your summation to the evidence that has been presented on this trial, and to nothing else. I am not going to permit you to discuss matters that are not part of the evidence in this case.

Do you understand that I am speaking to you, Mr. Johnstone?

THE DEFENDANT: I have nothing further to say.

THE COURT: Pardon Me [sic]?

THE DEFENDANT: I have nothing else to say [Tr. 522] to you.

THE COURT: You will answer my question because I am not going to permit you to sum up. You assure me you will limit your summation to what has been presented on this trial, what has been presented on the evidence in this case? Can I have your assurance of that?

THE DEFENDANT: (No response)

THE COURT: In that case, I will not permit you to sum up.

THE DEFENDANT: I will get up.

THE COURT: You will what?

THE DEFENDANT: I am going to get up.

THE COURT: You are not going to get up anyplace, Mr. Johnstone.

THE DEFENDANT: I have a right to give my own summation. I don't want him to give my summation. I got a lot of things that I have to do.

You were going to allow my lawyer to do what he was supposed to do, a lot of things did not work out. He can never find an investigator. I am going to sum up myself.

THE COURT: Just a minute, just a minute. [Tr. 523] I would permit you to sum up if you would give me your assurance you would limit your summation to the evidence that has been presented on this trial. Nothing else.

THE DEFENDANT: Yes.

THE COURT: Can I have your assurance of that?

THE DEFENDANT: You got it.

THE COURT: What [sic] that?

THE DEFENDANT: You got it.

THE COURT: I can't hear you?

THE DEFENDANT: I said you got it.

THE COURT: Bring the Jury in, please.

(Whereupon, the Jury enters the courtroom.)

COURT CLERK: Case on trial is continued, the People of the State of New York against Gregory Johnstone.

All parties, including the sworn Jurors and the alternates are present in the courtroom.

THE COURT: Good morning, ladies and gentlemen. I want to congratulate you, all of you, for getting in this morning. I think it is quite remarkable.

Does the Defendant have any

witnesses that he intends to call?

MR. VAN LEER: Judge, as I expressed before, [Tr. 524] the witnesses that were available have not appeared. Two have been subpoenaed, they have not appeared, and the other two I could not find. My investigator could not find.

THE COURT: I guess you have not [sic] witnesses?

MR. VAN LEER: We have no further witnesses. At this time, after consulting with the Defendant, we have one thing further that we have to discuss, your Honor.

(Whereupon, a discussion was held between Defense Counsel and Defendant.)

MR. VAN LEER: The Defendant now rests, your Honor.

THE COURT: Thank you, Mr. Van Leer.

In that case we are going to have the summations at this time, ladies and gentlemen.

Now, the Defendant has expressed a desire to sum up himself rather than through his attorney. I have given him permission to do so.

I want to advise you at this time, and remind you, what the Defendant says in his summation, like what the District Attorney says in his summation, is not evidence, and must not be considered by you as such.

No. 86-1706

IN THE

Supreme Court of the United States

October Term, 1986

WALTER J. KELLY, Superintendent,
Attica Correctional Facility,
and STATE OF NEW YORK,

Petitioners,

-against-

GREGORY JOHNSTONE,

Respondent.

On Petition for Writ of Certiorari of the United States Court of Appeals for the Second Circuit

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REPLY BRIEF

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TABLE OF AUTHORITIES

Cases:

Other:

No. 86-1706

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1986

WALTER J. KELLY, Superintendent,
Attica Correctional Facility, and
STATE OF NEW YORK,

Petitioners,

v.

GREGORY JOHNSTONE,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

REPLY BRIEF

REASONS FOR GRANTING THE WRIT

By doing little more than parroting the opinions of the federal

courts, respondent has failed to state anything in his Brief in Opposition that undercuts the arguments made in the Petition as to why this matter raises substantial issues of constitutional law for this Court to consider.

The first question raised by petitioner concerned the fact that the circuit court had transformed its habeas corpus jurisdiction into a broad grant of supervisory power. The court did that when it concluded in an opinion now reported at 812 F.2d 821 that in order for the state to maintain the sanctity of its judgment against petitioner it had to afford petitioner, who allegedly had been denied the right to proceed pro se, a retrial with the option of counsel. Respondent's answer is that the burden imposed on the state by the

federal court is not "justiciable." Without citing precedent, respondent asserts that petitioner is seeking an advisory opinion.

Of course, petitioner is not. First, petitioner seeks review of a final judgment of the Second Circuit which vitiates a state judgment. Second, the Second Circuit has conclusively determined that the state court is obligated to afford petitioner counsel on a retrial to preserve its judgment. Thus, the Second Circuit determination, in removing from the state any choice on this issue, is a final determination of a federal claim. Therefore, just as a discovery ruling that requires disclosure of confidential files was a final determination permitting review in Pennsylvania v.

Ritchie, 480 U.S. ___, ___-___, 107 S.Ct. 989, 996-998, 94 L.Ed.2d 40, 50-52 (1987), the propriety of this determination is correctly before this Court.

The remainder of respondent's argument respecting the question of remedy is no more than an effort to suggest that petitioner is wrong. However, that response, which appears to view habeas corpus review as no more than a level of appellate review, fails to controvert the conclusion that this case presents a substantial question appropriate for this Court to resolve.

Respondent's other points proceed on the same incorrect factual predicate on which the federal courts in this matter relied. His argument, as well, follows from a mistaken

understanding of the facts in Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), which respondent seeks to perpetuate in the Brief in Opposition.

More particularly, in this matter the state has consistently maintained that Johnstone's request to proceed pro se was merely a maneuver to force the appointment of new counsel. At the outset of the trial, Johnstone stated when denied new counsel:

> I am not going to go to trial with him. I am not going to represent myself I will just be there (Pet. App. at 48).

He repeatedly informed the judge that he wanted new counsel (Pet. App. 47, 55, 61, 67, 68) and that he believed that if he proceeded pro se he would gain a reversal of any conviction on the ground

that he was denied new counsel (Pet. App. at 52, 62-64; see also 66-67). In fact, as shown by the following colloquy between Johnstone's attorney and the judge, both saw the pro se request as an effort to gain new counsel:

> MR. VAN LEER: That is not truly his wish. His wish is to have another lawyer.
>
> THE COURT: I am aware of that. I turned that application down (Pet. App. at 73-74).

We have consistently argued throughout this litigation that the state judge rejected the application to proceed pro se at least in part because the request, prompted by a stubborn belief that any conviction would be reversed, was not an unequivocal request by defendant for permission to represent himself. Throughout the federal litigation the courts have scarcely even

given lip service to that argument and to the fact that, if supported by the record, it should have presumptively preclusive effect. Instead, the federal courts have focused, as respondent does now, on the state judge's wholly separate conclusion that Johnstone was not "qualified" to represent himself.

Importantly, however, regardless of which basis resulted in the state judge's rejection of the request to proceed pro se, it is plain from the record that the request stemmed from Johnstone's dissatisfaction with his assigned attorney. This is important because, as respondent does not appear to dispute and as we pointed out in our petition, there is diversity of opinion in the courts of this land over Faretta's requirement that a waiver of

counsel not be accepted unless it is made with the "eyes open." We pointed to the varying results between the Second Circuit and other circuits in situations where a criminal defendant seeks to proceed pro se because he is dissatisfied with an appointed attorney which the court will not replace (Pet. at 27-30).

Indeed, rather than dispute the diversity, respondent alleges in the Brief in Opposition that Faretta somehow resolves any question because Faretta made a request for counsel as an alternative to proceeding pro se. However, what we believe is critical is that, as Faretta's own brief to this Court alleged, Faretta first insisted on proceeding pro se. Only when that request was denied did he seek different

counsel. Brief for Petitioner at 9-10, Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). This was plainly set forth in our petition (Pet. at 29 n.); respondent, however, in the Brief in Opposition sought to perpetuate the same mistaken view of the Second Circuit that the reverse was true (Brief in Opposition at 27 n.). Thus, in Faretta's case his request to proceed pro se was not made, as was respondent's, because of a failed effort to replace his assigned attorney with another attorney.

Finally, rather than attempt to deal with why we believe that the Court should examine its dicta regarding harmless error in light of its other precedent in a case presenting the issue on an appropriate set of facts,

respondent does no more than cite the dicta as the reason for not granting certiorari.

* * *

As we concluded in our petition, we recognize that the fate of Gregory Johnstone does not justify review. What justifies review is that the decisions of the federal courts in this matter are at odds with what we believe are the appropriate norms of federal-state comity. The federal courts have imposed a remedy on the state that goes beyond what was alleged to have been lost by Johnstone. The federal courts also have paid no deference to the reality of the state court proceeding. Indeed, in a way that appears to conflict with other courts, the federal courts in this case have

interpreted Faretta's requirement of an "eyes open" waiver to mean no more than that warnings were "mouthed" to the criminal defendant. The decision below seems to vitiate any requirement that the judge not allow waiver of counsel unless the judge is satisfied that the criminal defendant is aware of the consequences of his waiver. Even if that is the correct view, in light of the fact that other courts have found the requirement to be the higher standard, this Court should grant the writ of certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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June, 1987